

16A Am. Jur. 2d Constitutional Law VII D Refs.

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

VII. Departmental Separation of Governmental Powers

D. Legislative Powers

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Research References

West's Key Number Digest

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16A Am. Jur. 2d Constitutional Law § 285

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VII. Departmental Separation of Governmental Powers

D. Legislative Powers

1. Character and Extent of Powers, In General

§ 285. Character and extent of legislative powers, generally

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑2340

"Legislative power" is defined as a legislature's lawmaking authority over subjects of a permanent or general character.¹ Legislative power is the power to make, alter, and repeal laws.² The legislature is charged with the responsibility for enacting substantive law that creates, defines, and regulates rights.³ In determining whether a statute is substantive law in this sense, the court recognizes that both substantive and procedural rights can be important or substantial and looks to the true function of the statute at issue rather than relying on labels.⁴ The function of the legislature is to declare what is the law and public policy, through the enactment of statutes,⁵ and public policy concerns are best resolved by the legislature.⁶ Furthermore, the legislature has the authority to engage in activity that is incidental or ancillary to its lawmaking functions.⁷

Observation:

Although Congress may not constitutionally delegate its legislative power to another branch of government, it may obtain assistance from other branches and, in determining what Congress may do when seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of government coordination.⁸

In some states, under the provisions of the state constitution, the legislative authority is subject to initiative and referendum provisions specifically reserved to the people.⁹

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Footnotes

- 1 [Price v. Pennsylvania Prop. & Cas. Ins. Co. Ass'n](#), 158 F. Supp. 2d 547 (E.D. Pa. 2001).
The meaning of the word "legislature," used several times in the Federal Constitution, differs according to the connection in which it is employed, dependent upon the character of the function that the body in each instance is called upon to exercise. [Arizona State Legislature v. Arizona Independent Redistricting Com'n](#), 135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015).
- 2 [State ex rel. Morrison v. Sebelius](#), 285 Kan. 875, 179 P.3d 366 (2008) (state legislature); [Halverson v. Hardcastle](#), 123 Nev. 245, 163 P.3d 428 (2007); [Jubelirer v. Rendell](#), 598 Pa. 16, 953 A.2d 514 (2008) (general assembly).
Enacting laws—and especially criminal laws—is quintessentially a legislative function. [Florida House of Representatives v. Crist](#), 999 So. 2d 601 (Fla. 2008).
- 3 [In re Marriage of Waldren](#), 217 Ariz. 173, 171 P.3d 1214 (2007).
The creation of new causes of action is a legislative function. [State v. Lead Industries, Ass'n, Inc.](#), 951 A.2d 428 (R.I. 2008).
The authority to determine the amount of appropriations necessary for performing the essential functions of government is vested fully and exclusively in the legislature. [Riley v. Joint Fiscal Committee of Alabama Legislature](#), 26 So. 3d 1150 (Ala. 2009).
- 4 [State v. Reed](#), 248 Ariz. 72, 456 P.3d 453 (2020).
- 5 [In re Trust Created by Nixon](#), 277 Neb. 546, 763 N.W.2d 404 (2009); [Hale v. Wellpinit School Dist. No. 49](#), 165 Wash. 2d 494, 198 P.3d 1021 (2009) (the legislature's role is to set policy and to draft and enact laws).
The legislature's exclusive power encompasses questions of fundamental policy and the articulation of reasonably definite standards to be used in implementing those policies. [Florida House of Representatives v. Crist](#), 999 So. 2d 601 (Fla. 2008).
- 6 [Hightower v. Baylor University Medical Center](#), 251 S.W.3d 218 (Tex. App. Dallas 2008).
The statutory boundaries of criminal sentences for violations of state law are questions of public policy for the general assembly to answer. [State v. Sturgis](#), 947 A.2d 1087 (Del. 2008).
- 7 [Zumbrun Law Firm v. California Legislature](#), 165 Cal. App. 4th 1603, 82 Cal. Rptr. 3d 525 (3d Dist. 2008), as modified on denial of reh'g, (Sept. 16, 2008).
- 8 [U.S. v. Senogles](#), 570 F. Supp. 2d 1134 (D. Minn. 2008).
- 9 [Shaw v. People ex rel. Chiang](#), 175 Cal. App. 4th 577, 96 Cal. Rptr. 3d 379 (3d Dist. 2009) (disapproved of on other grounds by, [County of San Diego v. Commission on State Mandates](#), 6 Cal. 5th 196, 240 Cal. Rptr. 3d 52, 430 P.3d 345 (Cal. 2018)); [State ex rel. Rankin v. Attorney General](#), 161 Ohio App. 3d 521, 2005-Ohio-2717, 831 N.E.2d 438 (10th Dist. Franklin County 2005); [Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature](#), 2007 OK 30, 158 P.3d 1058, 220 Ed. Law Rep. 360 (Okla. 2007).
Under the state constitution, the authority of the legislature and the power of the people to legislate through initiative and referenda are coequal, coextensive, and concurrent and share equal dignity [Gallivan v. Walker](#), 2002 UT 89, 54 P.3d 1069 (Utah 2002).
Powers of initiative and referendum, generally, see [Am. Jur. 2d, Initiative and Referendum §§ 1 to 53](#).

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VII. Departmental Separation of Governmental Powers

D. Legislative Powers

1. Character and Extent of Powers, In General

§ 286. Extent of, and limitations on, legislative power

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West's Key Number Digest

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As to state legislative authority, in accordance with the doctrine that the state constitution is not a grant of power but only a limitation, as far as the legislature is concerned,¹ it is a recognized principle of constitutional law that except when limitations have been imposed by the federal or state constitutions,² the authority of a state legislature is unlimited and practically absolute.³ The authority of a state legislature is plenary and its extent is limited only by the express or implied restrictions on it contained in or necessarily arising from the state constitution itself.⁴ Thus, a state legislature does not act under enumerated or granted powers but, rather, under inherent powers, restricted only by the provisions of the constitution.⁵ Restrictions and limitations upon legislative power are to be construed strictly, and are not to be extended to include matters that are not covered or implied by the language used.⁶ In contrast to state legislative authority, however, Congress may exercise only those powers enumerated in the Federal Constitution; its power is not absolute.⁷ The federal legislative powers are defined, and limited, and every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution; those that fall outside the scope of the powers conferred upon Congress are invalid.⁸ Congress alone has the institutional competence, democratic legitimacy, and, most importantly, constitutional authority to revise statutes in light of new social problems and preferences; until it exercises that power, the people may rely on the original meaning of the written law.⁹ Congress' authority over federal jurisdiction is an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.¹⁰

It is the province of the legislature to modify the common law.¹¹ When the legislative branch elects to legislate in respect to the subject matter of any common-law rule, the statute supplants the common-law rule and becomes the public policy of the state in respect to that particular matter.¹² The legislature also has exclusive power over deciding how, when, and for what purpose public funds shall be applied in carrying on the government,¹³ as the legislative power includes the authority to appropriate funds and to establish spending priorities.¹⁴ The legislative branch is empowered to make, interpret, and enforce its own procedural rules, and the judiciary cannot compel the legislature to act in accordance with its own procedural rules so long as constitutional questions are not implicated.¹⁵ However, one legislature may not enact a statute that has implications of control over the final deliberations or actions of future legislatures.¹⁶

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Footnotes

- 1 § 44.
- 2 *Biscayne Kennel Club, Inc. v. Florida State Racing Commission*, 165 So. 2d 762 (Fla. 1964); *Hatridge v. Home Life & Acc. Ins. Co.*, 246 S.W.2d 666 (Tex. Civ. App. Dallas 1951).
- 3 *Foundation for Taxpayer & Consumer Rights v. Garamendi*, 132 Cal. App. 4th 1354, 34 Cal. Rptr. 3d 354 (2d Dist. 2005), as modified, (Oct. 27, 2005); *Opinion of the Justices*, 623 A.2d 1258 (Me. 1993); *Franklin County ex rel. Parks v. Franklin County Com'n*, 269 S.W.3d 26 (Mo. 2008).
The general powers of the legislature, within constitutional limits, are almost plenary. *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005).
- 4 *Texas Com'n on Environmental Quality v. Abbott*, 311 S.W.3d 663 (Tex. App. Austin 2010).
- 5 *California State Personnel Bd. v. California State Employees Assn., Local 1000, SEIU, AFL-CIO*, 36 Cal. 4th 758, 31 Cal. Rptr. 3d 201, 115 P.3d 506 (2005); *Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134 (Fla. 2008).
- 6 *Kentucky Fried Chicken of McAlester v. Snell*, 2014 OK 35, 345 P.3d 351 (Okla. 2014).
- 7 *U.S. v. Wall*, 92 F.3d 1444, 1996 FED App. 0266P (6th Cir. 1996).
- 8 *U.S. v. Tom*, 565 F.3d 497 (8th Cir. 2009).
- 9 *Wisconsin Central Ltd. v. U.S.*, 138 S. Ct. 2067, 201 L. Ed. 2d 490 (2018).
- 10 *Patchak v. Zinke*, 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment).
- 11 *Larson v. Wasemiller*, 738 N.W.2d 300 (Minn. 2007).
- 12 *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 594 S.E.2d 1 (2004).
- 13 *State ex rel. Schwartz v. Johnson*, 1995-NMSC-080, 120 N.M. 820, 907 P.2d 1001 (1995).
- 14 *California Assn. of Retail Tobacconists v. State of California*, 109 Cal. App. 4th 792, 135 Cal. Rptr. 2d 224 (4th Dist. 2003).
Only the legislature has the authority to appropriate funds for the support of governmental programs. *Hunter v. State*, 177 Vt. 339, 2004 VT 108, 865 A.2d 381 (2004).
- 15 *Des Moines Register and Tribune Co. v. Dwyer*, 542 N.W.2d 491 (Iowa 1996).
- 16 *Madison Teachers, Inc. v. Walker*, 2014 WI 99, 358 Wis. 2d 1, 851 N.W.2d 337 (2014).

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VII. Departmental Separation of Governmental Powers

D. Legislative Powers

1. Character and Extent of Powers, In General

§ 287. Extent of, and limitations on, legislative power—Jurisdiction of courts; sovereign immunity

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2340, 2355, 2357

Within constitutional limits,¹ it is a legislative function to establish the jurisdiction of a court.² Thus, the legislature is the branch of government empowered to bestow subject-matter jurisdiction upon the courts.³ In particular, the Federal Constitution gives Congress the exclusive power to determine a lower federal court's subject-matter jurisdiction.⁴ Congress may not, however, exercise its authority, including its power to regulate federal jurisdiction, in a way that requires a federal court to act unconstitutionally.⁵ As a general proposition, the legislature cannot diminish the jurisdiction of courts established by a state constitution⁶ although the state legislature may define a justiciable matter in a way that precludes or limits the authority of the circuit court.⁷

The legislative branch determines the extent of a state's sovereign immunity;⁸ the legislature is within its inherent constitutional authority to structure governmental immunity solely as it deems appropriate.⁹ When Congress waives sovereign immunity for federal corporations, and even when it goes so far as to waive the corporation's immunity for discretionary functions, its action raises no constitutional separation of powers problems, because the right governmental actor (Congress) is making a decision within its bailiwick (to waive immunity) that authorizes an appropriate body (a court) to render a legal judgment.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Any power conferred to the district courts by the constitution cannot be legislatively limited or controlled; the Legislature may, however, grant to the district courts such additional jurisdiction as it may deem proper. [Benjamin M. v. Jeri S.](#), 307 Neb. 733, 950 N.W.2d 381 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [In re T.R.P.](#), 360 N.C. 588, 636 S.E.2d 787 (2006).
- 2 [Philson v. State](#), 899 N.E.2d 14 (Ind. Ct. App. 2008).
The legislature has the sole authority to define the jurisdiction of municipal courts. [City of Medina v. Primm](#), 160 Wash. 2d 268, 157 P.3d 379 (2007).
The General Assembly has the power under the Virginia Constitution to determine the jurisdiction of the courts of the Commonwealth. [Commonwealth v. Leone](#), 286 Va. 147, 747 S.E.2d 809 (2013).
- 3 [HUD/Barbour-Waverly v. Wilson](#), 235 Conn. 650, 668 A.2d 1309 (1995); [Tax Appeal of County of Maui v. KM Hawaii Inc.](#), 81 Haw. 248, 915 P.2d 1349 (1996).
- 4 [Primax Recoveries, Inc. v. Gunter](#), 433 F.3d 515, 2006 FED App. 0012P (6th Cir. 2006).
- 5 [Bank Markazi v. Peterson](#), 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016).
- 6 [Sentence Review Panel v. Moseley](#), 284 Ga. 128, 663 S.E.2d 679 (2008); [Susan L. v. Steven L.](#), 273 Neb. 24, 729 N.W.2d 35 (2007).
- 7 [In re Gilberto G.-P.](#), 375 Ill. App. 3d 728, 313 Ill. Dec. 910, 873 N.E.2d 534 (2d Dist. 2007).
- 8 [Wells by Wells v. Panola County Bd. of Educ.](#), 645 So. 2d 883, 95 Ed. Law Rep. 1161 (Miss. 1994).
- 9 [Mack v. City of Detroit](#), 467 Mich. 186, 649 N.W.2d 47 (2002).
- 10 [Thacker v. Tennessee Valley Authority](#), 139 S. Ct. 1435, 203 L. Ed. 2d 668 (2019).

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VII. Departmental Separation of Governmental Powers

D. Legislative Powers

1. Character and Extent of Powers, In General

§ 288. Extent of, and limitations on, legislative power—Determination of statutes of limitation, standing, crime, and punishment

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2340

The enactment of statutes of limitations is the prerogative of the legislature,¹ and it is within the legislature's authority to grant a party standing.² In addition, it is the function of the legislative branch to define crimes and prescribe punishments.³ The legislature has the power to make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense.⁴

Fixing the range of punishment for crime rests on policy determinations that the legislative branch is specially empowered to make,⁵ and the constitutional separation of powers would be meaningless if the judiciary were able to create exceptions to a criminal law based upon the judiciary's notion of fairness.⁶ The manner of executing a sentence and the mitigation of punishment are determined by the legislative department, and what the legislature has determined in that regard must be put in force and effect by administrative officers.⁷

In the federal system, there are serious, constitutional, separation-of-powers concerns that attach to sentences above the statutory maximum penalty authorized by Congress, for it is as if the defendant is being detained without authorization by any statute.⁸ Although the constitutional separation of powers prohibits a court from imposing criminal punishment beyond what Congress meant to enact, a court likewise is prohibited from imposing criminal punishment beyond what Congress in fact has enacted by a valid law; in either case a court lacks the authority to exact a penalty that has not been authorized by any valid criminal statute.⁹

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Footnotes

- 1 [Mitchell v. Progressive Ins. Co.](#), 965 So. 2d 679 (Miss. 2007); [S.V. v. R.V.](#), 933 S.W.2d 1 (Tex. 1996). Prescribing periods of repose, like periods of limitation, is a legislative function. [Schramm v. Lyon](#), 285 Ga. 72, 673 S.E.2d 241 (2009).
- 2 [DOIT, Inc. v. Touche, Ross & Co.](#), 926 P.2d 835 (Utah 1996).
- 3 [People v. Anderson](#), 47 Cal. 4th 92, 97 Cal. Rptr. 3d 77, 211 P.3d 584 (2009), as modified, (Aug. 26, 2009); [State v. Mayze](#), 280 Ga. 5, 622 S.E.2d 836 (2005); [State v. Lamy](#), 158 N.H. 511, 969 A.2d 451 (2009). Congress has unquestioned power to determine sentences for federal crimes; in doing so, Congress does not unconstitutionally invade the province of the federal courts. [U.S. v. Spencer](#), 25 F.3d 1105, 40 Fed. R. Evid. Serv. 1292 (D.C. Cir. 1994).
- 4 [State v. Sturgis](#), 947 A.2d 1087 (Del. 2008).
- 5 [People v. Wutzke](#), 28 Cal. 4th 923, 123 Cal. Rptr. 2d 447, 51 P.3d 310 (2002).
- 6 [State v. Burdick](#), 2006 SD 23, 712 N.W.2d 5 (S.D. 2006).
- 7 [McDonald v. North Carolina Dept. of Correction](#), 219 N.C. App. 536, 724 S.E.2d 138 (2012).
- 8 [U.S. v. Newbold](#), 791 F.3d 455 (4th Cir. 2015).
- 9 [Welch v. U.S.](#), 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016).

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VII. Departmental Separation of Governmental Powers

D. Legislative Powers

2. Limitations with Regard to Executive and Judiciary Departments

a. Encroaching on or Interfering with Executive

§ 289. Legislative encroachment on executive authority, generally

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West's Key Number Digest

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The legislature may define the scope of executive discretion so long as in doing so, it does not encroach upon the core power of the executive branch to execute a statute.¹ The separation-of-powers doctrine confines the power of the legislature to enacting laws and does not permit the legislature to execute laws that were already enacted.² The principle of separation of powers will be violated if the legislative department tries to control the execution of its enactments directly instead of indirectly by passing new legislation; direct legislative control of executive powers would be an impermissible usurpation of the central function of a coordinate branch.³ When a Presidential power is exclusive, it disables Congress from acting upon the subject.⁴

The legislature may not assume a power of clemency or pardon that is a unique function of executive power.⁵ The fact that the Constitution bestows on the President the power to grant reprieves and pardons for offenses against the United States implies that the other two branches do not have that power.⁶

Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner.⁷ Thus, the legislative branch may establish salaries for a wide range of positions in the executive branch of state government.⁸ The legislature may prescribe by statute procedures that are reasonably necessary to effectuate a constitutional purpose,⁹ and the legislature has constitutional authority to allocate executive department functions and duties among the offices, departments, and agencies of state government.¹⁰

Footnotes

- 1 [Opinion of the Justices](#), 892 So. 2d 332 (Ala. 2004).
- 2 [McNeil-Terry v. Roling](#), 142 S.W.3d 828 (Mo. Ct. App. E.D. 2004); [Knotts v. S.C. Dept. of Natural Resources](#), 348 S.C. 1, 558 S.E.2d 511 (2002).
The President may not pass legislation, and Congress may not act in an executive capacity. [In re Beck](#), 526 F. Supp. 2d 1291 (S.D. Fla. 2007).
- 3 [In re Request for Advisory Opinion from House of Representatives \(Coastal Resources Management Council\)](#), 961 A.2d 930 (R.I. 2008).
Oklahoma's fundamental law bars legislative intrusion upon the functions assigned by the Oklahoma Constitution to the Executive Branch. [Fent v. Contingency Review Bd.](#), 2007 OK 27, 163 P.3d 512 (Okla. 2007).
A bill providing that of \$3.6 million allocated to the commissioner of university and school lands for an information technology project, \$1.8 million "may be spent only upon approval of the budget section," was unconstitutional as violating separation of powers principles; by arrogating to itself, through a committee of its members, the power to administer appropriations, the legislature unconstitutionally encroached on the executive by consolidating the power to both make and execute the laws into its own hands. [North Dakota Legislative Assembly v. Burgum](#), 2018 ND 189, 916 N.W.2d 83 (N.D. 2018).
- 4 [Zivotofsky ex rel. Zivotofsky v. Kerry](#), 576 U.S. 1, 135 S. Ct. 2076, 192 L. Ed. 2d 83 (2015).
- 5 [Moreau v. Fuller](#), 276 Va. 127, 661 S.E.2d 841 (2008).
Legislation lessening punishment may not be applied to final convictions because this would constitute an invalid exercise by the legislature of the executive pardoning power. [State v. Iverson](#), 2006 ND 193, 721 N.W.2d 396 (N.D. 2006).
A provision of the State's Timely Justice Act, directing the governor to issue a warrant for execution within 30 days of receiving certification from the clerk of the Florida Supreme Court that a capital defendant has completed certain post-conviction proceedings, provided that the clemency process has concluded, does not constitute a separation of powers violation; conclusion of the clemency process is exclusively within the control and discretion of the executive branch and contains no mandated time frame for completion, even when the clerk of the Florida Supreme Court has certified a defendant's completion of certain post-conviction proceedings. [Abdool v. Bondi](#), 141 So. 3d 529 (Fla. 2014).
- 6 [U.S. v. Williams](#), 15 F.3d 1356, 1994 FED App. 0037P (6th Cir. 1994).
- 7 [Davis v. Passman](#), 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979).
- 8 [Administrative Office of Illinois Courts v. State and Mun. Teamsters, Chauffeurs and Helpers Union, Local 726](#), 167 Ill. 2d 180, 212 Ill. Dec. 627, 657 N.E.2d 972 (1995).
- 9 [California Correctional Peace Officers Assn. v. State Personnel Bd.](#), 10 Cal. 4th 1133, 43 Cal. Rptr. 2d 693, 899 P.2d 79 (1995).
- 10 [Capital Information Group v. State, Office of Governor](#), 923 P.2d 29 (Alaska 1996).

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VII. Departmental Separation of Governmental Powers

D. Legislative Powers

2. Limitations with Regard to Executive and Judiciary Departments

a. Encroaching on or Interfering with Executive

§ 290. Legislative encroachment on executive appointment powers

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In determining whether legislative appointments violate the separation of powers, the issue is whether the executive department is being subjected, directly or indirectly, to the coercive influence of the legislative department and if there is a significant interference by the legislative department with the executive department.¹ A state legislature can neither enforce the laws that it has the power to make, nor, in the usual circumstance, appoint the agents charged with the duty of that enforcement.² Appointment mechanisms specified by the legislature or the electorate by initiative are permissible under the separation-of-powers doctrine provided that they are subject to sufficient executive controls to ensure in the context that the appointments do not impair the executive branch's authority over the commissions.³

Congress does not have the authority to require the President to exercise the executive appointment power.⁴

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Footnotes

- ¹ [In re Application of Oklahoma Dept. of Transp., 2003 OK 105, 82 P.3d 1000 \(Okla. 2003\).](#)
- Although the separation of powers provision of the state constitution does not preclude all legislative enactments that authorize the legislature itself to appoint an executive officer, this authorization is limited; the test for the validity of the authorizing provisions is whether the provisions, viewed from realistic

and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions. [Marine Forests Society v. California Coastal Com.](#), 36 Cal. 4th 1, 30 Cal. Rptr. 3d 30, 113 P.3d 1062 (2005).

2 [State ex rel. Shepherd v. Nebraska Equal Opportunity Com'n](#), 251 Neb. 517, 557 N.W.2d 684 (1997).

3 [California Assn. of Retail Tobacconists v. State of California](#), 109 Cal. App. 4th 792, 135 Cal. Rptr. 2d 224 (4th Dist. 2003).

In contrast to the Federal Constitution, there is nothing in the California Constitution, including the separation-of-powers provision, that grants the governor or any other executive official the exclusive or paramount authority to appoint all executive officials or that prohibits the legislature from exercising that authority. [Marine Forests Society v. California Coastal Com.](#), 36 Cal. 4th 1, 30 Cal. Rptr. 3d 30, 113 P.3d 1062 (2005).

4 [Dysart v. U.S.](#), 369 F.3d 1303 (Fed. Cir. 2004).

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2. Limitations with Regard to Executive and Judiciary Departments

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§ 291. Legislative imposition of executive functions upon judiciary

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2390, 2564

A legislature cannot transfer to the judicial department power that is expressly conferred on the executive department exclusively by the state constitution.¹ Even when there is no express constitutional provision for nonexercise by any one of the branches of government of the powers of any of the other branches, the imposition of executive powers upon the judiciary is frequently viewed as fatally inconsistent with the principle of separation of powers.²

A statute is unconstitutional if it confers on the judiciary too much authority when it gives the judiciary the responsibility to independently and originally perform a nonjudicial function properly belonging to another branch of government, such as when a statute allows a court to step entirely into the role of an administrative agency and thus coopt executive judgment.³ A statute is not invalid as improperly conferring executive powers if the actual authority of the executive department is not really diminished.⁴ Also, it is permissible to confer upon the judiciary functions that, though executive, are reasonably incidental to performing judicial duties.⁵

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Footnotes

¹ [Montgomery v. State](#), 231 Ala. 1, 163 So. 365, 101 A.L.R. 1394 (1935).

- 2 [Porter v. Investors' Syndicate](#), 287 U.S. 346, 53 S. Ct. 132, 77 L. Ed. 354 (1932); [Peterson v. Livestock Commission](#), 120 Mont. 140, 181 P.2d 152 (1947) (a statute that tries to place the court in the role of a commission or board to try a matter anew as an administrative body is unconstitutional as a delegation to the judiciary of nonjudicial powers); [State v. Huber](#), 129 W. Va. 198, 40 S.E.2d 11, 168 A.L.R. 808 (1946). Statutes directing the chief circuit judge of counties containing cities of the first class and urban county governments to approve certain budget elements of the sheriffs of those government entities violate the separation of powers provision of the Kentucky Constitution. [Vaughn v. Knopf](#), 895 S.W.2d 566 (Ky. 1995).
- 3 [Millineum Maintenance Management, Inc. v. County of Lake](#), 384 Ill. App. 3d 638, 323 Ill. Dec. 819, 894 N.E.2d 845 (2d Dist. 2008). Statutes providing for appointment of the members of the Board of Bar Examiners by justices of the Supreme Judicial Court and providing the Board with authority, subject to the court's approval, to make rules for examinations for admission to the bar and conduct the exams were not unconstitutional under separation of powers principles; the authority to control membership in the bar was a judicial, not executive, power. [Strigler v. Board of Bar Examiners](#), 448 Mass. 1027, 864 N.E.2d 8 (2007).
- 4 [Oates v. Rogers](#), 201 Ark. 335, 144 S.W.2d 457 (1940).
- 5 [Rosenthal v. McGoldrick](#), 280 N.Y. 11, 19 N.E.2d 660 (1939).

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VII. Departmental Separation of Governmental Powers

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2. Limitations with Regard to Executive and Judiciary Departments

a. Encroaching on or Interfering with Executive

§ 292. Legislative interference with executive authority

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑2390

In accordance with constitutional provisions separating the departments of government, the legislature cannot interfere with, or exercise any authority that properly belongs to the executive department.¹ However, the legislature may try to control the executive branch by passing amendatory or supplemental legislation and presenting it to the governor for signature or veto, or by its power of appropriation.² Furthermore, the legislature may hold committee hearings, conduct investigations, or request information from the executive branch.³

Even though the legislature may limit the authority of the office of attorney general, which is a part of the executive branch of government, it may not remove the fundamental characteristics of the office, so as to leave an empty shell.⁴

CUMULATIVE SUPPLEMENT

Cases:

The longstanding practice of the Legislative Branch and the Executive Branch, of resolving, without benefit of guidance from the Supreme Court, disputes concerning congressional efforts to seek official Executive Branch information, is a consideration of great weight in cases concerning the allocation of power between the two elected branches of Government, and it imposes

on the Supreme Court a duty of care to ensure that it does not needlessly disturb the compromises and working arrangements that those Branches themselves have reached. [Trump v. Mazars USA, LLP](#), 140 S. Ct. 2019, 207 L. Ed. 2d 951 (2020).

[END OF SUPPLEMENT]

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Footnotes

- 1 [State ex rel. Shepherd v. Nebraska Equal Opportunity Com'n](#), 251 Neb. 517, 557 N.W.2d 684 (1997).
- 2 [Missouri Coalition for Environment v. Joint Committee on Administrative Rules](#), 948 S.W.2d 125 (Mo. 1997), as modified on denial of reh'g, (Feb. 25, 1997).
- 3 [Missouri Coalition for Environment v. Joint Committee on Administrative Rules](#), 948 S.W.2d 125 (Mo. 1997), as modified on denial of reh'g, (Feb. 25, 1997).
- 4 [Com. v. Johnson](#), 423 S.W.3d 718 (Ky. 2014).

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b. Encroaching on or Interfering with Judiciary

(1) Encroachment

§ 293. Legislative encroachment on judicial authority, generally

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West's Key Number Digest

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Since inherent judicial authority is derived from the constitutional doctrine of separation of powers and is grounded in judicial self-preservation, it can be neither augmented nor diminished by legislative acts.¹ Accordingly, the legislature is precluded from exercising powers entrusted to the judiciary,² and separation of powers issues arise when the legislature attempts to perform judicial functions,³ such as construing statutes,⁴ adjudicating rights, generally,⁵ and adjudicating the disposition of property.⁶ Thus, Congress may not usurp a court's power to interpret and apply the law to the circumstances before it.⁷ The legislature may regulate the exercise of a court's inherent powers as long as the regulation does not materially impair the exercise of those powers,⁸ as when, for example, Congress tells federal courts what constitutional rights to recognize.⁹ It is the responsibility of the Supreme Court, not Congress, to define the substance of constitutional guarantees.¹⁰

The legislature generally may adopt reasonable regulations affecting a court's inherent powers or functions so long as the legislation does not defeat or materially impair a court's exercise of its constitutional power or the fulfillment of its constitutional function.¹¹ In particular, since the lower federal courts are creatures of statute, the exercise of their inherent power can be limited by statute and rule,¹² and the constitutional endowment of authority to the judicial branch blocks Congress from requiring federal courts to exercise the judicial power in a manner that Article III forbids.¹³

Footnotes

- 1 [State v. S.L.H.](#), 755 N.W.2d 271 (Minn. 2008).
- 2 [Beyers v. Richmond](#), 594 Pa. 654, 937 A.2d 1082 (2007).
The separation of powers, among other things, prevents Congress from exercising the judicial power. [Patchak v. Zinke](#), 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment).
- 3 [State v. Mann](#), 146 Wash. App. 349, 189 P.3d 843 (Div. 3 2008).
- 4 [Staley v. State](#), 284 Ga. 873, 672 S.E.2d 615 (2009); [JRS Builders, Inc. v. Neunsinger](#), 364 S.C. 596, 614 S.E.2d 629 (2005).
- 5 [Millineum Maintenance Management, Inc. v. County of Lake](#), 384 Ill. App. 3d 638, 323 Ill. Dec. 819, 894 N.E.2d 845 (2d Dist. 2008); [Moreau v. Fuller](#), 276 Va. 127, 661 S.E.2d 841 (2008).
- 6 [Schneider v. County of San Diego](#), 285 F.3d 784 (9th Cir. 2002) (under Takings jurisprudence, interpreting "just compensation" is a judicial, not a legislative function).
- 7 [Bank Markazi v. Peterson](#), 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016); [Prudenti v. Suffolk County Legislature](#), 174 A.D.3d 807, 107 N.Y.S.3d 314 (2d Dep't 2019).
- 8 [New Albertsons, Inc. v. Superior Court](#), 168 Cal. App. 4th 1403, 86 Cal. Rptr. 3d 457 (2d Dist. 2008).
Inherent powers of the judiciary, see § 265.
The federal courts are subject to explicit congressional directives as to choice of law when those directives are constitutional. [Neely v. Club Med Management Services, Inc.](#), 63 F.3d 166 (3d Cir. 1995).
- 9 [Evans v. Thompson](#), 518 F.3d 1 (1st Cir. 2008).
- 10 [Board of Trustees of University of Alabama v. Garrett](#), 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866, 151 Ed. Law Rep. 35 (2001).
- 11 [Le Francois v. Goel](#), 35 Cal. 4th 1094, 29 Cal. Rptr. 3d 249, 112 P.3d 636 (2005), as modified, (June 10, 2005).
A challenged conviction-fee statute does not violate the separation of powers clause of state constitution if it or an interconnected statute provides for an allocation of the charged cost to be expended for legitimate criminal justice purposes. [Alvarez v. State](#), 571 S.W.3d 435 (Tex. App. Fort Worth 2019), petition for discretionary review refused, (May 15, 2019).
Although inherent powers of the judiciary may be recognized by statute, they exist independently because they directly affect the capacity of the judicial department to function and cannot be nullified by the legislature without violating separation of powers. [Querubin v. Com.](#), 440 Mass. 108, 795 N.E.2d 534 (2003).
- 12 [Armstrong v. Guccione](#), 470 F.3d 89 (2d Cir. 2006).
- 13 [Bank Markazi v. Peterson](#), 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016).

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VII. Departmental Separation of Governmental Powers

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2. Limitations with Regard to Executive and Judiciary Departments

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§ 294. Legislative enactment of rules affecting practice and procedure in courts

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2350, 2357, 2360

If the procedural elements of a statute are found to intrude impermissibly upon the procedural practice of the courts, the legislative provisions would have to give way to the court rules and procedures.¹ In some jurisdictions, the legislature, which is vested with the authority to enact laws, may enact legislation governing judicial practices as long as it does not unduly infringe on the powers of the courts.² The legislature may not, however, enact a procedural statute that conflicts with preexisting procedural rules, without violating the doctrine of separation of powers, and such a statute is of no force or effect.³ Thus, a statute allowing the admission of evidence obtained in violation of a procedure rule governing search warrants if the court determined that the violation was a result of a good-faith mistake or technical violation made by a law enforcement officer, court official, or the issuing magistrate was unconstitutional under the state constitution's separation-of-powers clause; the statute contradicted existing procedural rules and then-existing United States Supreme Court precedent.⁴

When a statute has some substantive aspects but the procedural requirements of the statute conflict with or interfere with the procedural mechanisms of the court system, those requirements are unconstitutional.⁵ Although the legislature may repeal a court procedural rule, the doctrine of constitutional separation of powers bars it from creating a new procedural rule by statute.⁶

Footnotes

- 1 [BDO Seidman, LLP v. Banco Espirito Santo Intern., Ltd.](#), 998 So. 2d 1 (Fla. 3d DCA 2008).
Venue in civil cases concerned a matter of pure procedure, and thus, a legislative act—providing that venue in medical professional liability cases is proper only in the county in which the cause of action arose—violated a constitutional provision giving exclusive authority to the Supreme Court to prescribe general procedural rules governing court operations. [North-Central Pennsylvania Trial Lawyers Ass'n v. Weaver](#), 827 A.2d 550 (Pa. Commw. Ct. 2003), as amended, (June 25, 2003).
- 2 [People v. Warren](#), 173 Ill. 2d 348, 219 Ill. Dec. 533, 671 N.E.2d 700 (1996).
The legislature may enact rules affecting practice and procedure until the Supreme Court exercises its inherent power to supersede any conflicting statutory provisions. [Grassie v. Roswell Hospital Corp.](#), 144 N.M. 241, 2008-NMCA-076, 185 P.3d 1091 (Ct. App. 2008).
- 3 [Berkson v. LePome](#), 126 Nev. 492, 245 P.3d 560 (2010).
- 4 [State v. Lowe](#), 552 S.W.3d 842 (Tenn. 2018), cert. denied, 139 S. Ct. 1204, 203 L. Ed. 2d 230 (2019).
- 5 [Massey v. David](#), 979 So. 2d 931 (Fla. 2008).
If there is no substantive right conveyed by a statute, the procedural aspects of the statute are not incidental, and accordingly, the statute violates state constitutional separation of powers by invading the state supreme court's rulemaking authority. [State v. Raymond](#), 906 So. 2d 1045 (Fla. 2005).
- 6 [State v. Raymond](#), 906 So. 2d 1045 (Fla. 2005).

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(1) Encroachment

§ 295. Legislative action with regard to control of the practice of law

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2374

Any legislative action to control the practice of law would be a violation of the doctrine of separation of powers.¹ The authority of a court to regulate the conduct of attorneys practicing before that court by revoking or suspending that privilege is both an inherent and a constitutional power that does not depend on its creation by legislative enactment and thus cannot be limited by statute.²

However, legislation that has only an incidental impact on the practice of law and that does not conflict with the essential mission of regulating the practice of law does not violate the separation of powers doctrine.³ For example, statutes may aid the determination of what constitutes the practice of law by providing machinery and criminal penalties but may not extend the privilege of practicing law to persons not admitted to practice by the judiciary; such statutes are merely in aid of and do not supersede or detract from the power of the judiciary to define and control the practice of law.⁴ The inherent right of courts to prescribe the qualifications necessary for the practice of law does not mean that the legislature is without any authority in that field; though the state supreme court, in the exercise of its authority within the premises, may require qualifications more extensive than those imposed by the legislature.⁵

Footnotes

- 1 [Preston v. Stoops](#), 373 Ark. 591, 285 S.W.3d 606 (2008); [Beyers v. Richmond](#), 594 Pa. 654, 937 A.2d 1082 (2007).
- 2 [In re Moseley](#), 273 Va. 688, 643 S.E.2d 190 (2007).
Any legislative attempt to limit what conduct the Supreme Court may consider as grounds for imposing attorney discipline would be an unconstitutional infringement of the court's authority to regulate the practice of law. [In re Treinen](#), 2006-NMSC-013, 139 N.M. 318, 131 P.3d 1282 (2006).
Responsibility for determining when and whether counsel must be appointed for a criminal defendant is a function of the judicial department, not the legislature. [Fraser v. Com.](#), 59 S.W.3d 448 (Ky. 2001).
- 3 [Hays v. Ruther](#), 298 Kan. 402, 313 P.3d 782 (2013).
A statute relating to attorney discipline does not in and of itself infringe on the Supreme Court's inherent authority and does not alone violate the separation of powers. [In re Paguirigan](#), 25 Cal. 4th 1, 104 Cal. Rptr. 2d 402, 17 P.3d 758 (2001).
- 4 [Eisel v. Midwest BankCentre](#), 230 S.W.3d 335 (Mo. 2007).
- 5 [Petition of Burson](#), 909 S.W.2d 768 (Tenn. 1995).

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(1) Encroachment

§ 296. Legislative actions concerning standing of litigants

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 2358

Since the constitution limits the judiciary to the exercise of judicial power, the legislature encroaches on the separation of powers by trying to grant standing to litigants who do not meet constitutional standing requirements.¹

When exercising its authority under Article I of the Constitution, which governs the legislative branch, Congress may relax the prudential standing rules that the judiciary has created, so long as it keeps within the limits of Article III, which governs the judicial branch.² Congress cannot confer Article III standing on a plaintiff, and thus open the door to federal court, when the plaintiff has not sustained an injury in fact; Article III's standing requirements still apply.³ Some concrete, intangible injuries, sufficient to satisfy the concreteness requirement for the injury-in-fact element for Article III standing, may flow from statutory violations, and Congress may define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, but there are restrictions.⁴ While Congress may create new procedural rights and provide plaintiffs with causes of action to vindicate those rights, separation-of-powers principles prevent Congress from expanding the scope of the judicial power beyond what Article III permits.⁵

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Footnotes

- 1 Miller v. Allstate Ins. Co., 481 Mich. 601, 751 N.W.2d 463 (2008); People ex rel. Spitzer v. Grasso, 54 A.D.3d 180, 861 N.Y.S.2d 627 (1st Dep't 2008).
- 2 American Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352 (D.C. Cir. 2000).
- 3 Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855 (6th Cir. 2020).
- 4 Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855 (6th Cir. 2020).
- 5 Buchholz v. Meyer Njus Tanick, PA, 946 F.3d 855 (6th Cir. 2020).

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b. Encroaching on or Interfering with Judiciary

(1) Encroachment

§ 297. Legislative actions concerning sentencing function of judiciary; mandatory sentences

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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Although sentencing is an exclusively judicial function, the legislature may choose to narrow the independent exercise of the courts' sentencing discretion.¹ Indeed, the legislature has the authority to define criminal punishments without giving the courts any sentencing discretion,² and mandatory sentences do not violate the principle of separation of powers.³ However, to the extent that a statute transfers judicial sentencing functions to another branch of government, it violates the separation of powers doctrine.⁴ Furthermore, even the use of impeccable fact-finding procedures cannot legitimate a guilty verdict if the conduct being penalized is constitutionally immune from punishment, nor can the use of flawless sentencing procedures legitimate a punishment if the Federal Constitution immunizes the defendant from the sentence imposed.⁵ The legislature has the power to completely eliminate the availability of probation without infringing upon the courts' constitutional duty to fairly administer justice, and thus the legislature may place reasonable limits on the availability of probation without interfering with the fair administration of justice.⁶

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Footnotes

¹ [Duquette v. Warden, New Hampshire State Prison, 154 N.H. 737, 919 A.2d 767 \(2007\).](#)

- 2 [State v. Sturgis](#), 947 A.2d 1087 (Del. 2008); [State v. Monteiro](#), 924 A.2d 784 (R.I. 2007).
The legislature has the discretion to prescribe penalties for defined offenses, which includes the power to prescribe mandatory sentences, even if the sentences restrict the judiciary's discretion in imposing sentences. [People v. Smolley](#), 375 Ill. App. 3d 167, 313 Ill. Dec. 713, 873 N.E.2d 8 (3d Dist. 2007).
- 3 [U.S. v. Khan](#), 461 F.3d 477 (4th Cir. 2006), as amended, (Sept. 7, 2006); [State v. Sturgis](#), 947 A.2d 1087 (Del. 2008).
The state constitution did not prohibit the legislature from constricting the independent exercise of judicial discretion by the requirement of mandatory sentences. [State v. Bird](#), 161 N.H. 31, 8 A.3d 146 (2010).
A statutory amendment that granted trial courts discretion to strike firearm enhancements in the case of convicted criminal defendants, but not in the case of insanity acquittees, was rationally related to a legitimate government purpose, and did not violate equal protection. [People v. K.P.](#), 30 Cal. App. 5th 331, 241 Cal. Rptr. 3d 324 (4th Dist. 2018), review denied, (Apr. 10, 2019).
A 10-year mandatory minimum sentence for conspiracy to distribute and possess with intent to distribute cocaine did not violate the separation-of-powers doctrine by granting prosecutors the sole discretion in deciding whether to pursue charges that carry mandatory minimum sentences and stripping the judicial branch of discretion in sentencing. [United States v. Syms](#), 846 F.3d 230 (7th Cir. 2017).
A mandatory consecutive life sentence for using a firearm while committing a crime of violence resulting in death did not violate the separation-of-powers doctrine based on the defendant's claim that the statute usurped judicial sentencing discretion; the general assembly, not the courts, was vested with the authority to define crimes and establish the appropriate punishment. [Sosa v. State](#), 949 A.2d 1014 (R.I. 2008).
- 4 [State v. Wade](#), 757 N.W.2d 618 (Iowa 2008).
- 5 [Montgomery v. Louisiana](#), 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), as revised, (Jan. 27, 2016).
- 6 [State v. Schwind](#), 2019 WI 48, 386 Wis. 2d 526, 926 N.W.2d 742 (2019).

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

VII. Departmental Separation of Governmental Powers

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2. Limitations with Regard to Executive and Judiciary Departments

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(1) Encroachment

§ 298. Legislative imposition of judicial functions upon nonjudicial officers or private individuals

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 2350, 2355

The authority granted by the state and federal constitutions to the courts to ultimately decide cases presented to them has never been—and can never be—delegated to executive agencies.¹ The separation-of-powers doctrine does not prohibit every exercise of judicial functions by individuals or groups outside the judiciary; nonetheless, the judiciary must maintain the power to check the exercise of judicial functions by quasi-judicial tribunals, ensuring that the essential attributes of judicial power, vis-à-vis other governmental branches, remain in the courts.² Thus, under the principle of separation of powers, it is settled that the legislature may not confer purely judicial functions upon members of the executive branch of government;³ ministerial officers cannot receive grants of judicial authority from the legislature, and their acts in attempting to exercise those powers necessarily lack legal validity.⁴ The rule applies equally to municipal councils.⁵

However, just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties have the option to try resolving their differences.⁶ Furthermore, Congress does have authority in some instances to create Article I courts without interfering with the existence and jurisdiction of Article III federal courts.⁷

Ordinarily, the legislature may not delegate judicial functions to private individuals.⁸

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Footnotes

- 1 [In re SRBA Case No. 39576, 128 Idaho 246, 912 P.2d 614 \(1995\).](#)
- 2 [Board of Educ. of Carlsbad Mun. Schools v. Harrell, 1994-NMSC-096, 118 N.M. 470, 882 P.2d 511, 94 Ed. Law Rep. 966 \(1994\); In re Commission on Judicial Tenure & Discipline, 670 A.2d 1232 \(R.I. 1996\) \(the presence of members of the state legislature on the Commission on Judicial Tenure and Discipline does not violate separation of powers\).](#)
- 3 [Tucker v. State, 218 Ind. 614, 35 N.E.2d 270 \(1941\); Ward Baking Co. v. Western Union Telegraph Co., 205 A.D. 723, 200 N.Y.S. 865 \(3d Dep't 1923\).](#)
- 4 [City and County of Denver v. Lynch, 92 Colo. 102, 18 P.2d 907, 86 A.L.R. 907 \(1932\); Otto v. Harllee, 119 Fla. 266, 161 So. 402 \(1935\); Dallas Fuel Co. v. Horne, 230 Iowa 1148, 300 N.W. 303 \(1941\); Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641 \(1933\).](#)
- 5 [Gough v. State ex rel. Sauls, 55 So. 2d 111 \(Fla. 1951\).](#)
- 6 [Commodity Futures Trading Com'n v. Schor, 478 U.S. 833, 106 S. Ct. 3245, 92 L. Ed. 2d 675 \(1986\).](#)
- 7 [Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 105 S. Ct. 3325, 87 L. Ed. 2d 409 \(1985\).](#)
- 8 [Anderson v. Carlson, 171 Neb. 741, 107 N.W.2d 535, 83 A.L.R.2d 831 \(1961\); Nickel v. School Bd. of Axtell, 157 Neb. 813, 61 N.W.2d 566 \(1953\).](#)

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2. Limitations with Regard to Executive and Judiciary Departments

b. Encroaching on or Interfering with Judiciary

(2) Interference

§ 299. Legislative interference with judicial functions, generally

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2350

Generally speaking, the judicial branch of government has exclusive authority to manage its own affairs¹ although this is not the case in every jurisdiction.² Also, the constitutional grant to the courts of judicial power ordinarily includes all powers necessary to completely perform the judicial function and establishes certain limits beyond which the legislature may not go in specifying how judicial authority is to be exercised.³

The rule is well settled that the judicial power cannot be taken away by legislative action,⁴ nor may the legislature regulate the judicial discretion or judgment that is vested in the courts.⁵ One way that Congress can cross the line from legislative power to judicial power, in violation of the separation of powers, is by usurping a court's power to interpret and apply the law to the circumstances before it.⁶ Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional.⁷ A legislative enactment that does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of government under the separation of powers doctrine.⁸

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Footnotes

- 1 [Horn by Horn v. Com.](#), 916 S.W.2d 173 (Ky. 1995); [Washington State Bar Ass'n v. State](#), 125 Wash. 2d 901, 890 P.2d 1047 (1995).
The distribution-of-powers clause of the Nebraska Constitution prohibits the legislative department of the state government from telling the judicial department how to conduct judicial business. [State ex rel. Grape v. Zach](#), 247 Neb. 29, 524 N.W.2d 788 (1994).
- 2 [State v. Williams](#), 938 S.W.2d 456 (Tex. Crim. App. 1997) (the Texas Constitution expressly grants the legislature the ultimate authority over judicial administration in that state, and that this express grant exempts legislative enactments regarding judicial administration from the proscriptions contained in the separation of powers clause, although the legislative power to regulate the administration of the courts does not permit legislative encroachment on substantive judicial powers).
- 3 [People v. Spegal](#), 5 Ill. 2d 211, 125 N.E.2d 468, 51 A.L.R.2d 1337 (1955); [State ex rel. Foster v. Board of County Com'rs of Lucas County](#), 16 Ohio St. 2d 89, 45 Ohio Op. 2d 442, 242 N.E.2d 884 (1968).
- 4 [State ex rel. Brubaker v. Pritchard](#), 236 Ind. 222, 138 N.E.2d 233, 60 A.L.R.2d 1239 (1956); [Dearborn Tp. v. Dail](#), 334 Mich. 673, 55 N.W.2d 201 (1952); [In re Miller's Estate](#), 160 Ohio St. 529, 52 Ohio Op. 437, 117 N.E.2d 598, 46 A.L.R.2d 493 (1954).
- 5 [Rich v. Ryals](#), 212 So. 2d 641 (Fla. 1968) (a statute attempting to control a court's judgment or discretion may be upheld as permissive only and not mandatory).
- 6 [Patchak v. Zinke](#), 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment).
- 7 [A.W. v. Com.](#), 163 S.W.3d 4 (Ky. 2005), as modified on denial of reh'g, (June 16, 2005); [Lemoine v. Martineau](#), 115 R.I. 233, 342 A.2d 616 (1975).
Under the separation of powers provision of the Texas Constitution, legislature plainly may not interfere with the functions and powers of the judicial branch so as to usurp those functions and powers. [In re D.W.](#), 249 S.W.3d 625 (Tex. App. Fort Worth 2008).
- 8 [Lynch v. City of Jellico](#), 205 S.W.3d 384 (Tenn. 2006).

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VII. Departmental Separation of Governmental Powers

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§ 300. Legislative interference in litigation

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2382 to 2384

The separation-of-powers doctrine precludes the legislature from undertaking to readjudicate controversies that have been litigated in the courts and resolved by final judicial judgment.¹ The legislature can pass legislation to prospectively change a judicial construction of a statute if it believes that the judicial interpretation was at odds with legislative intent, but it cannot effect a change in that construction by a later declaration of what it had originally intended.² Thus, legislation that targets an appellate court decision by professing to explain and interpret a statute and, thus, reach its original meaning, that is, the one the authors of the revised statute intended effectively constitutes the adjudication of cases in contravention of the separation of powers.³ Although the legislature may not retroactively overrule a decision of a state's highest court, the legislature may clarify a law in response to an administrative adjudication or trial court decision.⁴

Article III prohibits Congress from retroactively commanding the federal courts to reopen final judgments.⁵ Article III does not, however, prohibit Congress from enacting new laws that apply to pending civil cases,⁶ and a statute does not impinge on judicial authority when it directs courts to apply a new legal standard to undisputed facts.⁷ When a new law clearly governs pending cases, Article III does not prevent courts from applying it because each court, at every level, must decide according to existing laws, and this principle applies equally to statutes that strip jurisdiction.⁸

Observation:

Although Congress may not legislatively supersede Supreme Court decisions interpreting and applying the Constitution,⁹ Congress does have the authority to amend a statute that Congress believes the United States Supreme Court has misconstrued.¹⁰ Within broad constitutional bounds, Congress may even make such a change retroactive and thereby undo what Congress perceives to be the undesirable past consequences of a misinterpretation of Congress's work product; no such change, however, has the force of law unless the change is implemented through legislation.¹¹

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Footnotes

- 1 [Superior Court v. County of Mendocino](#), 13 Cal. 4th 45, 51 Cal. Rptr. 2d 837, 913 P.2d 1046 (1996).
The separation-of-powers doctrine is violated if Congress tries to apply a new law retroactively to cases that have already reached a final judgment. [Lundeen v. Canadian Pacific R. Co.](#), 532 F.3d 682 (8th Cir. 2008).
The legislature may not disturb a judicial decision rendered in a previous action, as to the parties to that action; to do so would violate the doctrine of separation of powers. [Grubb v. S.D. Warren Co.](#), 2003 ME 139, 837 A.2d 117 (Me. 2003).
- 2 [People v. Taylor](#), 2015 IL 117267, 388 Ill. Dec. 935, 25 N.E.3d 627 (Ill. 2015).
- 3 [Unwired Telecom Corp. v. Parish of Calcasieu](#), 903 So. 2d 392 (La. 2005).
The separation-of-powers principles inherent in Article III prohibit Congress from adjudicating particular cases legislatively. [Ruiz v. U.S.](#), 243 F.3d 941 (5th Cir. 2001).
- 4 [Port of Seattle v. Pollution Control Hearings Bd.](#), 151 Wash. 2d 568, 90 P.3d 659 (2004).
Once the state supreme court has construed a particular statute, the legislature cannot later amend the statute to alter court construction of the statute and have the amendment apply retroactively; to do so would invade judicial power. [JRS Builders, Inc. v. Neunsinger](#), 364 S.C. 596, 614 S.E.2d 629 (2005).
- 5 [Patchak v. Zinke](#), 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment); [Bank Markazi v. Peterson](#), 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016).
- 6 [Patchak v. Zinke](#), 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment).
- 7 [Patchak v. Zinke](#), 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment).
- 8 [Patchak v. Zinke](#), 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment).
- 9 [Dickerson v. U.S.](#), 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000).
- 10 [Rivers v. Roadway Exp., Inc.](#), 511 U.S. 298, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994).
- 11 [Rivers v. Roadway Exp., Inc.](#), 511 U.S. 298, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994).

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16A Am. Jur. 2d Constitutional Law § 301

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VII. Departmental Separation of Governmental Powers

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2. Limitations with Regard to Executive and Judiciary Departments

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(2) Interference

§ 301. Legislative interference in litigation—Pending cases

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2382, 2383

Direct legislative influence over the outcome of judicial proceedings is constitutionally constrained under separation-of-powers principles.¹ That is, the legislative branch may not violate the separation-of-powers doctrine by trying to direct specific results in pending litigation.² The legislature violates separation of powers principles by prescribing new rules to be applied to pending litigation only when doing so infringes on a judicial function by impeding upon the court's right and duty to apply new law to the facts of a case, dictating how the court should decide a factual issue or affecting a final judgment.³

Congress has the power to apply newly enacted, outcome-altering legislation in pending civil cases, even when the legislation governs one or a very small number of specific subjects.⁴ Furthermore, the federal separation of powers requirement does not preclude Congress from affecting pending cases by retroactively amending the applicable law,⁵ even when it effectively ensures that one side wins.⁶ However, consistent with the limitations established by Article III of the Constitution, Congress cannot enact a statute directing that, in "Smith v. Jones," "Smith wins," as such a statute would create no new substantive law but, instead, would direct the court how preexisting law applies to particular circumstances.⁷

Footnotes

- 1 [People v. Bunn](#), 27 Cal. 4th 1, 115 Cal. Rptr. 2d 192, 37 P.3d 380 (2002).
- 2 [Robertson v. Seattle Audubon Soc.](#), 503 U.S. 429, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992).
Congress cannot dictate findings or command specific results in pending cases. [Shawnee Tribe v. U.S.](#), 423 F.3d 1204 (10th Cir. 2005).
Separation of powers is violated where Congress has impermissibly directed certain findings in pending litigation and has not changed any underlying law. [The Ecology Center v. Castaneda](#), 426 F.3d 1144 (9th Cir. 2005).
The legislature's amendment to a statute, which applied retroactively to overrule a trial court's grant of a motion to compel production of a voter registration database in an action challenging the constitutionality of a voter registration statute, did not violate separation of powers; the legislature amended the statute to state that the information contained in the database could not be disclosed pursuant to a civil litigation discovery request, and an interlocutory trial court discovery order that the amendment overruled did not amount to a judgment that was immune from revision by the legislation prior to the time it attained the status of a final judgment. [Petition of New Hampshire Secretary of State](#), 171 N.H. 728, 203 A.3d 77 (2019).
- 3 [Washington State Farm Bureau Federation v. Gregoire](#), 162 Wash. 2d 284, 174 P.3d 1142 (2007).
Congress may change the substantive law governing a pending case so long as it does not direct any particular findings of fact or application of law, old or new, to a fact. [Consejo de Desarrollo Economico de Mexicali, A.C. v. U.S.](#), 482 F.3d 1157 (9th Cir. 2007).
- 4 [Patchak v. Zinke](#), 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment).
- 5 [Patchak v. Zinke](#), 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment); [King v. Campbell County](#), 217 S.W.3d 862 (Ky. Ct. App. 2006).
- 6 [Patchak v. Zinke](#), 138 S. Ct. 897, 200 L. Ed. 2d 92 (2018) (per Justice Thomas, with three Justices concurring, and two Justices concurring in the judgment).
- 7 [Bank Markazi v. Peterson](#), 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016) (thus, a hypothetical law, directing judgment for "Smith" if the court finds that "Jones" was duly served with notice of the proceedings, would be invalid under separation-of-powers principles).

16A Am. Jur. 2d Constitutional Law § 302

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VII. Departmental Separation of Governmental Powers

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2. Limitations with Regard to Executive and Judiciary Departments

b. Encroaching on or Interfering with Judiciary

(2) Interference

§ 302. Legislative actions concerning judicial contempt procedures

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 2375

Although in some jurisdictions the circumstance that a court has inherent power to punish contempt does not mean that the legislature is powerless to enact statutes regulating contempt procedures or punishment,¹ the legislature ordinarily cannot deprive a court of its authority to enforce its valid decrees, orders, and judgments by contempt proceedings.² Also, Congress can constitutionally curtail the contempt powers of the federal courts.³

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Footnotes

- 1 [Superior Court v. County of Mendocino](#), 13 Cal. 4th 45, 51 Cal. Rptr. 2d 837, 913 P.2d 1046 (1996); [Walker v. Bentley](#), 678 So. 2d 1265 (Fla. 1996).
Although contempt powers are inherent to courts, the legislature may limit and has limited the categories to which contempt orders may apply. [Van Dyke v. Van Dyke](#), 538 N.W.2d 197 (N.D. 1995).
- 2 [People v. Warren](#), 173 Ill. 2d 348, 219 Ill. Dec. 533, 671 N.E.2d 700 (1996).
- 3 [In re Michael](#), 326 U.S. 224, 66 S. Ct. 78, 90 L. Ed. 30 (1945).

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VII. Departmental Separation of Governmental Powers

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2. Limitations with Regard to Executive and Judiciary Departments

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§ 303. Legislative actions concerning rules of evidence; burden of proof; discovery

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2359, 2362

In some jurisdictions the legislature does not violate separation of powers principles by enacting laws that govern the procedures and evidentiary rules applicable in judicial proceedings, provided that the rules do not defeat or materially impair the core functions of the judiciary.¹ To demonstrate that the legislature infringed on the judiciary's authority to enact evidentiary rules, an appellant must demonstrate that the legislation contradicts or is an attempt to supersede an existing evidentiary rule.² Also, since the legislature is empowered to set burdens of proof as a matter of substantive law, a valid statute specifying the burden of proof prevails over common law or court rules adopting a different standard.³

The control of discovery procedure in cases pending in court is within the court's inherent power; a power so carefully guarded that a statute which encroaches on it is unconstitutional.⁴

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Footnotes

- ¹ [Britts v. Superior Court](#), 145 Cal. App. 4th 1112, 52 Cal. Rptr. 3d 185 (6th Dist. 2006); [State v. Kulmac](#), 230 Conn. 43, 644 A.2d 887 (1994) (rules pertaining to the admissibility of evidence in Connecticut are subject

to the exercise of both judicial and legislative authority); [First Nat. Bank of Chicago v. King](#), 165 Ill. 2d 533, 209 Ill. Dec. 199, 651 N.E.2d 127 (1995).

The legislature's authority to enact rules of evidence is not unlimited, and any exercise of that power by the legislature must inevitably yield when it seeks to govern the practice and procedure of the courts. [State v. Mallard](#), 40 S.W.3d 473 (Tenn. 2001).

2 [State v. Mason](#), 2013-Ohio-2612, 994 N.E.2d 36 (Ohio Ct. App. 11th Dist. Portage County 2013).

3 [Seisinger v. Siebel](#), 220 Ariz. 85, 203 P.3d 483 (2009).

The legislature may establish and even change judicially adopted burdens of proof. [Mildred L.M. v. John O.F.](#), 192 W. Va. 345, 452 S.E.2d 436 (1994) (holding modified on other grounds by, [Dodrill v. Nationwide Mut. Ins. Co.](#), 201 W. Va. 1, 491 S.E.2d 1 (1996)).

4 [Rolfe v. New Britain General Hosp.](#), 47 Conn. Supp. 296, 790 A.2d 1194 (Super. Ct. 2001).

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16A Am. Jur. 2d Constitutional Law § 304

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§ 304. Legislative actions concerning right to appeal

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2372

The legislature has the power to limit the right of appeal¹ so long as it preserves constitutional rights.² In some jurisdictions, however, the legislature may only regulate the practice of appealing from nonfinal orders and set limits on the time for review.³

CUMULATIVE SUPPLEMENT

Cases:

Statute prohibiting a represented defendant from filing a pro se supplemental brief on appeal did not violate separation-of-power doctrine; statute was a proper exercise of legislature's constitutional authority to regulate practice and procedure in state courts, and legislature's decision to advance the interests of having counsel and client speak with one voice, of allowing counsel to prevent frivolous argument by a client, and of reducing procedural confusion did not impede the immediate, necessary, efficient, and basic functioning of the appellate courts. [Iowa Const. art. 3, § 1](#); [Iowa Const. art. 5, § 14](#); [Iowa Code Ann. § 814.6A](#). [State v. Thompson](#), 954 N.W.2d 402 (Iowa 2021).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Woodlands Plumbing Co., Inc. v. Rodgers](#), 47 S.W.3d 146 (Tex. App. Texarkana 2001).
Except in the area of administrative review, the legislature cannot control the courts' power to adjudicate justiciable matters but has nearly unfettered authority to allow or disallow judicial review of administrative acts. [Millineum Maintenance Management, Inc. v. County of Lake](#), 384 Ill. App. 3d 638, 323 Ill. Dec. 819, 894 N.E.2d 845 (2d Dist. 2008).
- 2 [People v. Bellows](#), 281 N.Y. 67, 22 N.E.2d 238 (1939).
A provision of Proposition 66, the State's Death Penalty Reform and Savings Act, imposing a five-year limit on the completion of appellate and initial habeas review processes in capital cases, was directive rather than mandatory and thus did not violate the separation of powers doctrine; the five-year period expressed the voters' view of what would ordinarily constitute a reasonable time to complete review proceedings but allowed the courts to make individualized decisions based on the circumstances of each case. [Briggs v. Brown](#), 3 Cal. 5th 808, 221 Cal. Rptr. 3d 465, 400 P.3d 29 (Cal. 2017), as modified on denial of reh'g, (Oct. 25, 2017).
- 3 [In re D.D.H.](#), 319 Ill. App. 3d 989, 255 Ill. Dec. 251, 749 N.E.2d 31 (5th Dist. 2001).

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VII. Departmental Separation of Governmental Powers

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§ 305. Legislative actions concerning employment by judiciary of nonjudicial officers, salaries; fees and costs

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West's Key Number Digest, [Constitutional Law](#)  2350, 2379, 2380

The legislature may set policies controlling the hiring and firing of nonjudicial officers of the judicial branch, and it may establish salaries for a wide range of positions in the judicial branch of the state governments.¹ By failing to consider judicial compensation independently on the merits, and instead tying it to unrelated legislative objectives and policy initiatives, the state legislature threatens the structural independence of the judiciary, in violation of the separation-of-powers doctrine.²

The legislature may set filing fees and direct where those funds are to be appropriated³ and limit or prohibit the award of attorney's fees and costs against the state.⁴ Thus, a statute that expressly prohibits the award of costs or attorney's fees against the state is a legitimate exercise of the legislature's substantive authority to award attorney's fees, and the statute does not violate the separation-of-powers doctrine.⁵

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Footnotes

- 1 Administrative Office of Illinois Courts v. State and Mun. Teamsters, Chauffeurs and Helpers Union, Local
726, 167 Ill. 2d 180, 212 Ill. Dec. 627, 657 N.E.2d 972 (1995).
- 2 Maron v. Silver, 14 N.Y.3d 230, 899 N.Y.S.2d 97, 925 N.E.2d 899 (2010).
- 3 Payne v. Commonwealth Dept. of Corrections, 582 Pa. 375, 871 A.2d 795 (2005).
- 4 In re SRBA Case No. 39576, 128 Idaho 246, 912 P.2d 614 (1995).
- 5 In re SRBA Case No. 39576, 128 Idaho 246, 912 P.2d 614 (1995).

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16A Am. Jur. 2d Constitutional Law § 306

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VII. Departmental Separation of Governmental Powers

D. Legislative Powers

2. Limitations with Regard to Executive and Judiciary Departments


b. Encroaching on or Interfering with Judiciary

(2) Interference

§ 306. Legislative actions concerning disqualification of or recusal by judges

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2367

The legislature may adopt reasonable rules and regulations governing the disqualification of judges, as long as it does not defeat or materially impair the judicial function.¹ Congress has the authority to declare that a judge be disqualified in any proceeding in which the judge's impartiality might reasonably be questioned.²

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Footnotes

¹ [People v. Superior Court \(Mudge\)](#), 54 Cal. App. 4th 407, 62 Cal. Rptr. 2d 721 (2d Dist. 1997), as modified, (May 9, 1997); [State v. Holmes](#), 106 Wis. 2d 31, 315 N.W.2d 703 (1982).

The legislature did not exercise a judicial function or create a separation of powers problem by providing rules for judge disqualification but, rather, plainly exercised its own function of writing legislation. [State ex rel. Ray Wells, Inc. v. Hargreaves](#), 306 Or. 610, 761 P.2d 1306 (1988).

² [Duplantier v. U.S.](#), 606 F.2d 654 (5th Cir. 1979).

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16A Am. Jur. 2d Constitutional Law § 307

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VII. Departmental Separation of Governmental Powers

D. Legislative Powers

2. Limitations with Regard to Executive and Judiciary Departments

b. Encroaching on or Interfering with Judiciary

(2) Interference

§ 307. Legislative actions concerning creation of new courts or grant or withdrawal of appellate jurisdiction

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2355 to 2357

The legislative branch may create courts.¹ This authority does not interfere with the judicial branch of government, but the legislature cannot ordinarily diminish, enlarge, or interfere with the jurisdiction of a court whose jurisdiction is set out in the constitution itself.² Subject to constitutional limitations, the legislature has broad power to confer appellate jurisdiction³ or to take it away.⁴ Also, the legislature may grant concurrent jurisdiction to another court.⁵

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Footnotes

- ¹ [Willy v. Coastal Corp.](#), 503 U.S. 131, 112 S. Ct. 1076, 117 L. Ed. 2d 280, 21 Fed. R. Serv. 3d 1121 (1992) (acting pursuant to its authority to make all laws "necessary and proper" to the establishment of lower federal courts, Congress may enact laws regulating the conduct of those courts and the means by which their judgments are enforced).
- ² [Marbury v. Madison](#), 5 U.S. 137, 2 L. Ed. 60, 1803 WL 893 (1803); [King v. Finch](#), 428 F.2d 709 (5th Cir. 1970); [Bandy v. Mickelson](#), 73 S.D. 485, 44 N.W.2d 341, 22 A.L.R.2d 1129 (1950).
- ³ [People v. Blakeslee](#), 308 N.Y. 289, 125 N.E.2d 573 (1955).

4

Congress can change the appellate jurisdiction of the Supreme Court and can take particular matters from the lower federal courts and assign them exclusively to special tribunals. [Yakus v. U. S.](#), 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944); [Lockerty v. Phillips](#), 319 U.S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943). [Gleason v. Samaritan Home](#), 260 Kan. 970, 926 P.2d 1349 (1996) (the Kansas Constitution gives to the district and appellate courts jurisdiction to hear appeals, such as may be provided by law, and the state constitution gives the legislature the power to grant, limit, and withdraw appellate jurisdiction to be exercised by the courts).

5

[In re Malloy's Estate](#), 278 N.Y. 429, 17 N.E.2d 108 (1938).

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VII. Departmental Separation of Governmental Powers

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16A Am. Jur. 2d Constitutional Law § 308

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

1. In General; Delegation of Executive or Judicial Authority

§ 308. Delegation of governmental powers, generally

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 2333

Law Reviews and Other Periodicals

Redish, [Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine](#), 51 Loy. U. Chi. L.J. 363 (2019)

The separation of powers doctrine encompasses two fundamental prohibitions; the first is that no branch may encroach upon the powers of another, and the second is that no branch may delegate to another branch its constitutionally assigned authority.¹ Not all delegation of authority is per se unconstitutional, however.² In particular, the separation of powers doctrine implicates improper delegation from one branch of government to another; it does not apply to delegations of power by one branch to a public agency or private entity.³ Delegation of important governmental authority requires careful and purposeful consideration by those empowered to perform those functions.⁴ Whether a particular delegation of power is proper is a question of degree.⁵

A number of state constitutions contain specific provisions prohibiting one governmental branch from delegating any of its authority to another governmental branch.⁶

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Footnotes

- 1 Florida Ass'n of Professional Lobbyists, Inc. v. Division of Legislative Information Services, 7 So. 3d 511 (Fla. 2009); Gray v. Gienapp, 2007 SD 12, 727 N.W.2d 808 (S.D. 2007).
- 2 New Jersey State Firemen's Mut. Benev. Ass'n v. North Hudson Regional Fire & Rescue, 340 N.J. Super. 577, 775 A.2d 43 (App. Div. 2001).
- 3 Newport Intern. University, Inc. v. State, Dept. of Educ., 2008 WY 72, 186 P.3d 382, 233 Ed. Law Rep. 944 (Wyo. 2008).
- 4 Warren County Bd. of Health v. Warren County Bd. of Supervisors, 654 N.W.2d 910 (Iowa 2002).
- 5 Tri-Nel Management, Inc. v. Board of Health of Barnstable, 433 Mass. 217, 741 N.E.2d 37 (2001).
- 6 In re Nebraska Community Corrections Council to Adopt Voluntary Sentencing Guidelines for Felony Drug Offenses, 274 Neb. 225, 738 N.W.2d 850 (2007); Marran v. Baird, 635 A.2d 1174 (R.I. 1994); Gray v. Gienapp, 2007 SD 12, 727 N.W.2d 808 (S.D. 2007).
The core functions or powers of various branches of the government are nondelegable under the Utah Constitution. Salt Lake City v. Ohms, 881 P.2d 844 (Utah 1994).

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

1. In General; Delegation of Executive or Judicial Authority

§ 309. Delegation of executive power

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑2626

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Congress makes laws and the President, acting at times through agencies, faithfully executes them.¹ The President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch.² Although the President's duty, in general, requires superintendence of the administration and general oversight of various government departments, the President is obviously not required to perform—and is not capable of performing in person—the numerous details incident to those services.³ In most matters, the President can delegate parts of the executive power to heads of executive departments, executive officials, and agencies.⁴ The President may speak and act through them,⁵ and their acts must be regarded as presumptively the acts of the President.⁶

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- 1 [Utility Air Regulatory Group v. E.P.A.](#), 573 U.S. 302, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014).
A court's understanding of the reach and purpose of the Take Care Clause, [U.S. Const. Art. II, § 3](#), requiring the President to "take Care that the Laws be faithfully executed" must be informed by the separation-of-powers doctrine and the history that influenced its design. [Center for Biological Diversity v. Bernhardt](#), 946 F.3d 553 (9th Cir. 2019) (holding that a joint resolution enacted by Congress pursuant to the Congressional

Review Act disapproving of the Department of the Interior's rule preventing Alaska from applying certain state hunting regulations on federal wildlife refuges did not violate the Clause).

2 [Free Enterprise Fund v. Public Co. Accounting Oversight Bd.](#), 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010).

3 [Williams v. U.S.](#), 42 U.S. 290, 1 How. 290, 11 L. Ed. 135, 1843 WL 5995 (1843).

4 [Runkle v. U.S.](#), 22 Ct. Cl. 487, 122 U.S. 543, 7 S. Ct. 1141, 30 L. Ed. 1167 (1887).

5 [Wilcox v. Jackson ex dem. McConnel](#), 38 U.S. 498, 10 L. Ed. 264, 1839 WL 4329 (1839).

6 [Bishop v. U.S.](#), 197 U.S. 334, 25 S. Ct. 440, 49 L. Ed. 780 (1905); [Ide v. U.S.](#), 29 Ct. Cl. 558, 150 U.S. 517, 14 S. Ct. 188, 37 L. Ed. 1166 (1893); [U.S. v. Fletcher](#), 28 Ct. Cl. 551, 148 U.S. 84, 13 S. Ct. 552, 37 L. Ed. 378 (1893).

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

1. In General; Delegation of Executive or Judicial Authority

§ 310. Delegation of judicial power

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2570, 2571

Under the constitutional doctrine of separation of powers, judicial powers may not be completely delegated to or exercised by either nonjudicial officers or private parties¹

A court may not simply abdicate its role to the legislature, especially when the issue involves the division of power between local government and that same legislature, as the judicial branch, not the legislative, is the final arbiter of this question² even with the consent of the litigants.³ Thus, Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.⁴

Federal courts are not prohibited from using nonjudicial officers to support judicial functions as long as the judicial officer retains and exercises ultimate responsibility.⁵

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- ¹ [In re S.H.](#), 111 Cal. App. 4th 310, 3 Cal. Rptr. 3d 465 (2d Dist. 2003).
In amending the defendant's sentence, the trial court erred in delegating its responsibility to conduct a restitution hearing to its court attorney. [People v. Weber](#), 64 A.D.3d 1185, 883 N.Y.S.2d 671 (4th Dep't 2009).

It is the function of the trial judge to determine the law of the case rather than delegating that duty to a witness to provide testimony about controlling legal principles. [Slyman v. City of Piqua](#), 494 F. Supp. 2d 732 (S.D. Ohio 2007), [aff'd](#), 518 F.3d 425 (6th Cir. 2008).

[County of Riverside v. Superior Court](#), 30 Cal. 4th 278, 132 Cal. Rptr. 2d 713, 66 P.3d 718 (2003).

[Crum v. Randall](#), 198 S.W.2d 936 (Tex. Civ. App. Dallas 1946).

A statute empowering court commissioners upon the consent of the defendant to conduct misdemeanor trials, impose sentences, and enter final judgments of conviction delegated the judicial power of the state of Utah to nonjudges, in violation of the Utah Constitution. [State v. Taysom](#), 886 P.2d 513 (Utah 1994).

[Bank Markazi v. Peterson](#), 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016).

[U.S. v. York](#), 357 F.3d 14 (1st Cir. 2004).

When imposing supervised release, the district court can delegate limited authority to nonjudicial officials so long as the delegating judicial officer retains and exercises ultimate responsibility. [U.S. v. Bender](#), 566 F.3d 748 (8th Cir. 2009).

The district court did not impermissibly delegate its sentencing authority by allowing a supervised releasee's sex offender counselor to require that he undergo polygraph examinations; the underlying supervised release conditions in question, i.e., nonpossession of pornographic materials and Internet nonutilization were imposed by the district court not by the defendant's counselor or probation officer. [U.S. v. Brigham](#), 569 F.3d 220 (5th Cir. 2009).

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

1. In General; Delegation of Executive or Judicial Authority

§ 311. Delegation of judicial power—Nondelegable judicial powers

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2571 to 2574

Once the jurisdiction of the court has been invoked, it is the trial judge who possesses the judicial power to hear cases, decide disputed issues of fact and law, enter a judgment in accordance with the facts and the law, and enforce its judgment, and the authority thus granted to trial courts must be exercised by them as a nondelegable duty; they cannot—even with the consent of the parties—delegate to another agency or tribunal the decision of any issue within their jurisdiction once that jurisdiction has been lawfully invoked.¹ A trial court cannot delegate the sole authority to perform a purely judicial function.² However, there is authority that delegating functions normally associated with the judiciary, such as determining facts, applying the law, and entering judgments, does not violate the separation of powers clause of a state constitution.³

It is the function of the trial judge to determine the law of the case rather than delegating that duty to a witness to provide testimony about controlling legal principles.⁴ In matters of statutory construction, the court has the ultimate responsibility, which cannot be delegated.⁵ Also, a court may not delegate to a nonjudicial staff member its authority to instruct the jury on matters affecting their deliberations.⁶ The duty of the trial judge to make up the record is a judicial function and cannot be delegated,⁷

Matters that the judiciary generally is prohibited from delegating include:

- Sentencing authority⁸

- Imposing terms and conditions of probation⁹
- Authority to set bail and determine the condition of the bail bond¹⁰
- Determining a restitution payment schedule¹¹
- Courtroom security¹²

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Footnotes

- 1 [In re J.S.P.](#), 278 S.W.3d 414 (Tex. App. San Antonio 2008).
To avoid an unconstitutional delegation of judicial authority, the state constitution requires a stipulation of the parties before a trial court may refer a cause to be tried by a referee. [People v. Superior Court \(Laff\)](#), 25 Cal. 4th 703, 107 Cal. Rptr. 2d 323, 23 P.3d 563 (2001).
- 2 [State Farm Mut. Auto. Ins. Co. v. Kendrick](#), 780 So. 2d 231 (Fla. 3d DCA 2001).
The trial court may not delegate or abdicate any of its judicial powers to a master. [Lediner v. Harris](#), 145 S.W.3d 479 (Mo. Ct. App. S.D. 2004).
- 3 [Dabin v. Director of Revenue](#), 9 S.W.3d 610 (Mo. 2000), as modified on denial of reh'g, (Feb. 8, 2000).
- 4 [Slyman v. City of Piqua](#), 494 F. Supp. 2d 732 (S.D. Ohio 2007), aff'd, 518 F.3d 425 (6th Cir. 2008).
- 5 [LWD Equipment, Inc. v. Revenue Cabinet](#), 136 S.W.3d 472 (Ky. 2004).
In executing its duty to interpret statutes, the judiciary may not give any executive branch agency power to overrule an established statutory construction of the court. [Bankers Trust New York Corp. v. U.S.](#), 225 F.3d 1368 (Fed. Cir. 2000).
- 6 [People v. Flores](#), 282 A.D.2d 688, 725 N.Y.S.2d 655 (2d Dep't 2001).
- 7 [Bland v. Virginia State University](#), 272 Va. 198, 630 S.E.2d 525, 209 Ed. Law Rep. 911 (2006).
- 8 [U.S. v. White](#), 782 F.3d 1118 (10th Cir. 2015); [Richardson v. State](#), 947 So. 2d 1219 (Fla. 1st DCA 2007); [State v. Meredyk](#), 754 N.W.2d 596 (Minn. Ct. App. 2008); [State v. Hemmes](#), 2007 ND 161, 740 N.W.2d 81 (N.D. 2007).
Imposing sentences, including determining conditions of probation, is exclusively a judicial function that cannot be delegated to executive agencies. [State v. Ornelas](#), 675 N.W.2d 74 (Minn. 2004).
Three core principles arise in separation of powers challenges to statutes granting sentencing discretion to prosecutors in the plea bargain context: first, the Attorney General must promulgate uniform statewide guidelines designed to channel that discretion and minimize sentencing disparity between counties, taking into account the legislative objective in the sentencing statute; second, in order to facilitate effective judicial review, the prosecutor must provide a written statement of reasons for his or her exercise of prosecutorial discretion; and third, the sentencing court maintains oversight to ensure that prosecutorial discretion is not exercised in an arbitrary and capricious manner. [State v. A.T.C.](#), 239 N.J. 450, 217 A.3d 1158 (2019).
The evidence did not show that the trial judge improperly delegated his sentencing authority to and engaged in improper ex parte contact with the prosecutor during the sentencing phase of a capital murder trial. [Rodriguez v. State](#), 919 So. 2d 1252 (Fla. 2005), as revised on denial of reh'g, (Jan. 19, 2006).
- 9 [State v. Meredyk](#), 754 N.W.2d 596 (Minn. Ct. App. 2008); [State v. Stevens](#), 373 S.C. 595, 646 S.E.2d 870 (2007).
- 10 [People v. Rickman](#), 178 P.3d 1202 (Colo. 2008).
- 11 [Pearce v. State](#), 968 So. 2d 92 (Fla. 2d DCA 2007).
A district court did not impermissibly delegate its authority in setting the total amount of restitution that a defendant was required to pay by delegating the establishment of a restitution repayment plan to the Internal Revenue Service (IRS). [U.S. v. May](#), 568 F.3d 597 (6th Cir. 2009).
- 12 [Cooley v. State](#), 385 Md. 165, 867 A.2d 1065 (2005).

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

1. In General; Delegation of Executive or Judicial Authority

§ 312. Delegation of judicial power—Delegable judicial powers

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2570, 2572 to 2574

The judicial branch of government may delegate purely ministerial judicial functions to others.¹ A sentencing court may not delegate excessively; the court may not completely abdicate its judicial responsibility for setting the conditions of a defendant's release.² Generally, however, sentencing courts have the power to delegate some aspects of community placement to the department of corrections.³ So long as the sentencing judge retains ultimate responsibility, he or she may delegate limited authority to probation officers relating to special conditions of supervised release.⁴ Also, the internal operating procedure of a judicial circuit in appointing a district attorney to act as a calendar clerk for criminal matters merely aids the judges in the judicial circuit in organizing their courts and is not an unconstitutional delegation of judicial powers, as the functions of the district attorney are not exclusively executive.⁵

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Footnotes

- ¹ [In re Dirk S.](#), 14 Cal. App. 4th 1037, 17 Cal. Rptr. 2d 643 (2d Dist. 1993) (the court delegated only the ministerial considerations as to the specific time and place of a visitation order); [People v. Branch](#), 35 A.D.3d 228, 825 N.Y.S.2d 215 (1st Dep't 2006) (the court directed a court officer to perform the ministerial act of informing the jury that the court would not grant its request for a written copy of the charge); [Johnson v. State](#), 1977 OK CR 255, 568 P.2d 355 (Okla. Crim. App. 1977) (the court delegated to the Department

of Corrections the ministerial authority to designate the reporting frequency required under a suspended sentence).

Allowing a chemical-health assessor to determine a probationer's need for treatment and the type or level of treatment needed, if any, delegates only administrative implementation of a probation condition imposed by the court. [State v. Bradley](#), 756 N.W.2d 129 (Minn. Ct. App. 2008).

No improper delegation of judicial authority or violation of the defendant's right to be present occurred when the trial court with the defense counsel's consent, directed a clerk to respond to the jury's inquiry by advising the jurors that they could neither see a copy of the court's charge nor take notes; the action was a ministerial act rather than a judicial function. [People v. Jonson](#), 27 A.D.3d 289, 811 N.Y.S.2d 366 (1st Dep't 2006).

[State v. Sansone](#), 127 Wash. App. 630, 111 P.3d 1251 (Div. 1 2005).

[State v. Autrey](#), 136 Wash. App. 460, 150 P.3d 580 (Div. 3 2006).

Since referrals to the drug court were incorporated in the plea-bargaining process, a county's practice allowing the prosecutor to make the initial determinations of drug court eligibility was not an unconstitutional delegation of judicial authority to the prosecutor under the separation-of-powers doctrine. [State v. DiLuzio](#), 121 Wash. App. 822, 90 P.3d 1141 (Div. 3 2004).

[U.S. v. Bender](#), 566 F.3d 748 (8th Cir. 2009); [U.S. v. Smart](#), 472 F.3d 556 (8th Cir. 2006).

Special condition of supervised release, requiring the defendant to enter, cooperate, and complete a sex-offense treatment program until released by the probation office, did not impermissibly delegate judicial authority to the probation office by allegedly allowing the office to determine the extent of the defendant's punishment, as there was no indication that the trial court intended to relinquish ultimate responsibility, and the defendant therefore had recourse to the district court if he objected to the direction of the probation office. [United States v. Thompson](#), 888 F.3d 347 (8th Cir. 2018).

If the court makes the determination of whether a defendant must abide by a condition of probation, it is permissible to delegate to the probation officer the details of where and when the condition will be satisfied. [U.S. v. Nash](#), 438 F.3d 1302 (11th Cir. 2006).

[Adams v. State](#), 282 Ga. App. 819, 640 S.E.2d 329 (2006).

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Constitutional Law

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

2. Delegation of Legislative Authority

a. Rule Barring Delegation

§ 313. Rule barring delegation of legislative authority, generally

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Forms

Forms relating to unlawful delegation, see Am. Jur. Pleading and Practice Forms, Constitutional Law [[Westlaw® Search Query](#)]

Law Reviews and Other Periodicals

Redish, [Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine](#), 51 Loy. U. Chi. L.J. 363 (2019)

The purpose of the doctrine that legislative authority cannot be delegated is to assure that truly fundamental issues will be resolved by the legislature and that a grant of authority is accompanied by safeguards adequate to prevent its abuse.¹ The nondelegation doctrine insures that citizens are protected against discriminatory and arbitrary actions of public officials, and it provides the assurance that duly authorized, politically accountable officials make fundamental policy decisions.² There is no unconstitutional delegation of legislative authority if the legislature has provided reasonable limitations and standards for carrying out delegated duties.³ The complexity of the subject matter at issue determines how precise the standards must be for determining whether a legislative delegation of power is valid.⁴

Although the legislature may delegate its merely incidental powers,⁵ the nondelegation doctrine provides that the legislature, except when expressly authorized by the state constitution,⁶ cannot delegate purely legislative power to a nonlegislative branch of government⁷ or to any other body, person, board, or commission.⁸ A delegation of legislative power occurs when an entity is given a public duty and the discretion to set public policy, promulgate rules to achieve that policy, or ascertain conditions upon which existing laws will apply.⁹

A number of state constitutions contain specific provisions prohibiting one governmental branch from delegating any of its authority to another governmental branch¹⁰ although as a practical matter, the states are free to allocate the lawmaking function to whatever branch of state government they may choose.¹¹

CUMULATIVE SUPPLEMENT

Cases:

When analyzing whether a statute is an unconstitutional delegation of legislative power because it lacks standards, guidelines, restrictions or qualifications of any sort placed in the delegating legislation, the Supreme Court must consider the practical context of the problem to be remedied and the policy to be served. [Bedke v. Ellsworth](#), 480 P.3d 121 (Idaho 2021).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Coastside Fishing Club v. California Resources Agency](#), 158 Cal. App. 4th 1183, 71 Cal. Rptr. 3d 87 (1st Dist. 2008).
- 2 [Newport Court Club Associates v. Town Council of the Town of Middletown](#), 800 A.2d 405 (R.I. 2002).
- 3 [Schumacher v. Johanns](#), 272 Neb. 346, 722 N.W.2d 37 (2006); [Kaveny v. Town of Cumberland Zoning Bd. of Review](#), 875 A.2d 1 (R.I. 2005).
A legislative delegation of authority is reasonable and constitutional as long as the legislature sets standards controlling the exercise of discretion and retains the right to withdraw the delegation. [Owens v. Jefferson County Fiscal Court](#), 128 S.W.3d 834 (Ky. Ct. App. 2004).
- 4 [Kent County Aeronautics Bd. v. Department of State Police](#), 239 Mich. App. 563, 609 N.W.2d 593 (2000), judgment aff'd, 463 Mich. 652, 624 N.W.2d 906 (2001).
- 5 [Zumbrun Law Firm v. California Legislature](#), 165 Cal. App. 4th 1603, 82 Cal. Rptr. 3d 525 (3d Dist. 2008), as modified on denial of reh'g, (Sept. 16, 2008).
- 6 [West St. Paul Federation of Teachers v. Independent School Dist. No. 197, West St. Paul](#), 713 N.W.2d 366, 208 Ed. Law Rep. 893 (Minn. Ct. App. 2006).
- 7 [Mudarri v. State](#), 147 Wash. App. 590, 196 P.3d 153 (Div. 2 2008), as corrected, (Jan. 21, 2009).

A statute that, in effect, reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers. [Bakalekos v. Furlow](#), 2011 Ark. 505, 410 S.W.3d 564 (2011).

8 [West St. Paul Federation of Teachers v. Independent School Dist. No. 197](#), West St. Paul, 713 N.W.2d 366, 208 Ed. Law Rep. 893 (Minn. Ct. App. 2006); [State v. Rhine](#), 255 S.W.3d 745 (Tex. App. Fort Worth 2008), petition for discretionary review granted, (Aug. 20, 2008) and judgment aff'd, 297 S.W.3d 301 (Tex. Crim. App. 2009).

9 [City of Santa Fe v. Boudreaux](#), 256 S.W.3d 819 (Tex. App. Houston 14th Dist. 2008).

10 § 308.

11 § 245.

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Constitutional Law

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

2. Delegation of Legislative Authority

a. Rule Barring Delegation

§ 314. Congress as within rule barring delegation of legislative authority

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Law Reviews and Other Periodicals

Redish, [Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine](#), 51 Loy. U. Chi. L.J. 363 (2019)

Accompanying the Constitution's assignment of all legislative power to Congress is a bar on its further delegation, and Congress may not transfer to another branch powers that are strictly and exclusively legislative.¹ In determining whether a statutory delegation of authority by Congress violates the Constitution's assignment of all legislative power to Congress, the nondelegation inquiry always begins and often almost ends with statutory interpretation, because the constitutional question is whether Congress has supplied an intelligible principle to guide the delegatee's use of discretion, and the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides.² Thus, under the nondelegation doctrine, Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested.³

Under the nondelegation principle, if Congress delegates a relatively narrow task, it need not cabin the actor's discretion as to how to accomplish that task, whereas if it delegates a broad duty it must provide substantial guidance.⁴

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Footnotes

- 1 [Gundy v. United States, 139 S. Ct. 2116, 204 L. Ed. 2d 522 \(2019\)](#) (per Justice Kagan, with three Justices concurring and one Justice concurring in the judgment).
- 2 [Gundy v. United States, 139 S. Ct. 2116, 204 L. Ed. 2d 522 \(2019\)](#) (per Justice Kagan, with three Justices concurring and one Justice concurring in the judgment).
- 3 [U.S. v. Ambert, 561 F.3d 1202 \(11th Cir. 2009\)](#); [U.S. v. Hernandez, 615 F. Supp. 2d 601 \(E.D. Mich. 2009\)](#).
- 4 [U.S. v. Martinez-Flores, 428 F.3d 22 \(1st Cir. 2005\)](#).

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

2. Delegation of Legislative Authority

a. Rule Barring Delegation

§ 315. Legislative powers within rule barring delegation

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The powers that the legislature is prohibited from delegating are those which are strictly, or inherently and exclusively, legislative.¹ Thus, in order for a court to be warranted in holding a statute unconstitutional as a delegation of legislative authority, the power involved must be one that is purely legislative in nature, meaning one that pertains exclusively to the legislative department.² It is the nature of the power and not the manner of its exercise that determines the validity of its delegation.³ The test for whether a statute violates separation of powers is to examine the challenged legislation to learn whether it delegates the power to create basic policy or fails to supply intelligible standards as guides in the exercise of the power delegated.⁴

Purely legislative power, which can never be delegated, has been described as the authority to make a complete law—complete as to the time when it will take effect and as to whom it will apply—and to determine the expediency of its enactment.⁵ Thus, the legislature may not delegate its authority to enact laws,⁶ or to suspend⁷ or repeal them.⁸ Thus, the legislative authority to create and define criminal offenses cannot be delegated.⁹ Also, its budget-making responsibilities may not be delegated.¹⁰ The legislature cannot delegate its power to appropriate money unless specifically authorized by the federal or state constitutions¹¹ although the clause¹² of the Federal Constitution providing that all bills for raising revenue must originate in the United States House of Representatives—though expressing the framers' concern that persons elected directly by the people have initial responsibility over taxation—implies nothing about the scope of Congress' power to delegate discretionary authority under its taxing power once a tax bill has been properly enacted.¹³ In addition, the legislature cannot constitutionally delegate to

another body its fundamental decision-making authority, in the sense that it cannot delegate functions that the state constitution expressly and unqualifiedly vests in the legislature itself, such as its power to impeach, to propose constitutional amendments, or to enact statutes.¹⁴ Any legislative delegation of power to a legislative or executive agency permitting the agency to declare what the law is violates the separation of powers doctrine.¹⁵ The legislature may not delegate such essential elements of its lawmaking power as its power to declare principles and standards or general public policy.¹⁶

The legislature may, however, delegate authority and discretion in connection with the execution and administration of its law, and it may establish primary guidelines and bestow upon others the duty to carry out declared legislative policy in accordance with the general provisions of the enabling legislation; the touchstone of such delegation is that it is for the legislature to make basic policy choices.¹⁷ Furthermore, in the federal system, although the "non-delegation doctrine" provides that Congress generally cannot delegate its legislative power to another branch, some amount of delegation is unavoidable and limits on delegation are frequently stated but rarely invoked; the modern test is whether Congress has provided an intelligible principle to guide and agency's regulations.¹⁸

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Footnotes

- 1 [Alexander v. Thompson](#), 313 F. Supp. 1389 (C.D. Cal. 1970); [Cary v. City of Rapid City](#), 1997 SD 18, 559 N.W.2d 891 (S.D. 1997).
The general assembly cannot delegate its essential legislative power to administrative bodies or officers. [Redman v. Ohio Dept. of Indus. Relations](#), 75 Ohio St. 3d 399, 1996-Ohio-196, 662 N.E.2d 352 (1996).
The legislature is prohibited from delegating its purely legislative functions. [Sackett v. Santilli](#), 146 Wash. 2d 498, 47 P.3d 948 (2002).
- 2 [State v. Steenhoek](#), 182 N.W.2d 377 (Iowa 1970); [Hatfield v. New Mexico State Board of Registration for Professional Engineers and Land Surveyors](#), 1955-NMSC-067, 60 N.M. 242, 290 P.2d 1077 (1955); [Montana-Dakota Utilities Co. v. Johanneson](#), 153 N.W.2d 414 (N.D. 1967).
- 3 [Cochnow v. U.S.](#), 248 U.S. 405, 39 S. Ct. 137, 63 L. Ed. 328 (1919), judgment modified on other grounds, 249 U.S. 588, 39 S. Ct. 387, 63 L. Ed. 790 (1919); [Lee v. Delmont](#), 228 Minn. 101, 36 N.W.2d 530 (1949).
- 4 [State v. Outka](#), 2014 SD 11, 844 N.W.2d 598 (S.D. 2014).
- 5 [Lee v. Delmont](#), 228 Minn. 101, 36 N.W.2d 530 (1949); [City of Milwaukee v. Sewerage Commission of City of Milwaukee](#), 268 Wis. 342, 67 N.W.2d 624 (1954).
- 6 [Knight & Wall Co. v. Bryant](#), 178 So. 2d 5 (Fla. 1965); [People v. Tibbitts](#), 56 Ill. 2d 56, 305 N.E.2d 152 (1973); [Akin v. Director of Revenue](#), 934 S.W.2d 295, 114 Ed. Law Rep. 964 (Mo. 1996); [Martin v. North Carolina Housing Corp.](#), 277 N.C. 29, 175 S.E.2d 665 (1970); [MCI Telecommunications Corp. v. Heitkamp](#), 523 N.W.2d 548 (N.D. 1994); [Department of Environmental Protection v. Cumberland Coal Resources, LP](#), 628 Pa. 17, 102 A.3d 962 (2014); [State v. Grinstead](#), 157 W. Va. 1001, 206 S.E.2d 912 (1974).
- 7 § 316.
- 8 [Nahlen v. Woods](#), 255 Ark. 974, 504 S.W.2d 749 (1974).
- 9 [State v. All Pro Paint & Body Shop, Inc.](#), 639 So. 2d 707 (La. 1994).
- 10 [Moore v. Board of Sup'rs of Hinds County](#), 658 So. 2d 883 (Miss. 1995).
- 11 [State ex rel. Schwartz v. Johnson](#), 1995-NMSC-080, 120 N.M. 820, 907 P.2d 1001 (1995).
- 12 U.S. Const. Art. I, § 7, cl. 1.
- 13 [Skinner v. Mid-America Pipeline Co.](#), 490 U.S. 212, 109 S. Ct. 1726, 104 L. Ed. 2d 250 (1989).
- 14 [Christ by Christ v. Maryland Dept. of Natural Resources](#), 335 Md. 427, 644 A.2d 34 (1994).
- 15 [Florida Gas Transmission Co. v. Public Service Com'n](#), 635 So. 2d 941 (Fla. 1994).
- 16 [Dearborn Fire Fighters Union, Local No. 412, I. A. F. F. v. City of Dearborn](#), 394 Mich. 229, 231 N.W.2d 226 (1975); [State ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County](#), 120 Ohio St. 464, 166 N.E. 407 (1929), *aff'd*, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710, 66 A.L.R. 1460 (1930).

17 Department of Environmental Protection v. Cumberland Coal Resources, LP, 628 Pa. 17, 102 A.3d 962
(2014).
18 § 317.

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

2. Delegation of Legislative Authority

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§ 316. Legislative powers within rule barring delegation—Power to suspend law

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The rule is well established that the legislature cannot authorize the suspension of a law by another agency even in those cases when the legislature itself has the power to suspend the law.¹ Indeed, several state constitutions provide that the authority to suspend laws cannot be exercised except by the legislature² or by its authority.³

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Footnotes

- 1 [Montgomery v. State](#), 231 Ala. 1, 163 So. 365, 101 A.L.R. 1394 (1935); [Winslow v. Fleischer](#), 112 Or. 23, 228 P. 101, 34 A.L.R. 826 (1924).
- 2 See, e.g., [Ex parte Smythe](#), 56 Tex. Crim. 375, 120 S.W. 200 (1909).
- 3 [McPherson v. State](#), 174 Ind. 60, 90 N.E. 610 (1909); [Ex parte Mode](#), 77 Tex. Crim. 432, 180 S.W. 708 (1915) (overruled in part on other grounds by, [Lyle v. State](#), 80 Tex. Crim. 606, 193 S.W. 680 (1917)).
An agreed order that prohibited the state attorney general from issuing a decision under the State's Open Records Act regarding professional school employee transcripts until completion of the regular session of the legislature violated the state constitutional prohibition against suspending laws and was held void. [Houston Chronicle Pub. Co. v. Mattox](#), 767 S.W.2d 695, 53 Ed. Law Rep. 312 (Tex. 1989).

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

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a. Rule Barring Delegation

§ 317. Limitations on rule barring delegation of legislative authority; permissible delegation

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The general rule barring delegation of legislative powers is subject to several recognized limitations or exceptions. Thus, the rule does not bar Congress¹ or other legislatures from delegating their powers that are not strictly legislative in nature.² However, although the "nondelegation doctrine" provides that Congress generally cannot delegate its legislative authority to another branch, some amount of delegation is unavoidable, and limits on delegation are frequently stated but rarely invoked; the modern test is whether Congress has provided an intelligible principle to guide and agency's regulations.³ So long as Congress lays down by legislative act intelligible principle to which the person or body authorized to act is directed to conform, the legislative action is not a forbidden delegation of legislative power.⁴ A statutory delegation of authority by Congress does not violate the Constitution's assignment of all legislative power to Congress if Congress has made clear to the delegee the general policy it must pursue and the boundaries of its authority.⁵ Congress can seek assistance from another branch of government if it lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.⁶ Further, Congress is not confined to using a method of executing its policy that involves the least possible delegation of discretion.⁷

In order to determine whether the delegation of legislative authority is proper, it must be determined whether the legislature delegated the making of fundamental policy decisions rather than just the implementation of a legislatively determined policy; whether the act provided adequate direction for implementation, either in the form of statutory standards or, if the local authority is to develop standards, sufficient guidance to enable it to do so; and whether the act provided safeguards such that abuses of

discretion could be controlled.⁸ Under the sliding-scale approach in analyzing the validity of a delegation of authority to an administrative agency, the constitutionality of the delegation is determined on the basis of the scope of power delegated and the specificity of standards to govern its exercise; when the scope increases to immense proportions, the standards must be correspondingly more precise, and these standards may be either explicit or implicit.⁹

The courts recognize that there is a large field in which the legislature may certainly delegate to others powers that the legislature may rightfully exercise itself,¹⁰ so long as the enabling statute provides sufficient safeguards to guide administrative officials.¹¹ Thus, while the legislature may not delegate legislative power as such to an administrative or executive authority, it does have the power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose or for the complete operation and enforcement of a law within designated limitations; however, the standards by which the granted powers are to be administered must be clearly and definitely stated in the authorizing act and may not rest on indefinite, obscure, or vague generalities or upon extrinsic evidence that is not readily available.¹² If the policy and purpose of the legislature are clearly expressed, the absence of detailed standards in legislation will not necessarily render it invalid as an unlawful delegation of legislative authority. The standards for the action to carry out the declared legislative policy may be found not only in express provisions of an act but also in its necessary implications.¹³ The fact that a term is subject to interpretation by an administrative agency does not, in and of itself, mean that there has been an unlawful delegation of legislative power.¹⁴ Only in the event of a total abdication of that power through failure either to render basic policy decisions or to assure that they are implemented as made will the judiciary intrude on legislative enactments for being an unlawful delegation, and then only to preserve the representative character of the process of reaching legislative decision.¹⁵

Mere matters of detail within the policy and the legal principles and standards established by the legislature are essentially ministerial rather than legislative.¹⁶ Thus, a statute conferring discretionary authority upon a county clerk, without properly defining the terms under which the discretion is to be exercised, is void as an unlawful delegation of legislative authority; however, the legislature need not establish absolute criteria for anticipating every detail and circumstance necessary to enforcement the law.¹⁷ Necessity fixes the point beyond which it is unreasonable and impracticable to compel the legislature to prescribe detailed rules for a delegation of legislative authority.¹⁸

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Footnotes

- 1 [Arver v. U.S.](#), 245 U.S. 366, 38 S. Ct. 159, 62 L. Ed. 349 (1918); [Kansas Gas & Electric Co. v. City of Independence, Kan.](#), 79 F.2d 32, 100 A.L.R. 1479 (C.C.A. 10th Cir. 1935).
Application to Congress of the rule of nondelegability, generally, see § 314.
- 2 [City of Alexandria v. Alexandria Fire Fighters Ass'n, Local No. 540](#), 220 La. 754, 57 So. 2d 673 (1952); [Motsinger v. Perryman](#), 218 N.C. 15, 9 S.E.2d 511 (1940).
- 3 [Mistretta v. U.S.](#), 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989); [U.S. v. Whaley](#), 577 F.3d 254 (5th Cir. 2009).
- 4 [U.S. v. Voice](#), 621 F. Supp. 2d 741 (D.S.D. 2009), *aff'd* on other grounds, 622 F.3d 870 (8th Cir. 2010).
- 5 [Gundy v. United States](#), 139 S. Ct. 2116, 204 L. Ed. 2d 522 (2019) (per Justice Kagan, with three Justices concurring and one Justice concurring in the judgment).
- 6 [U.S. v. Santana](#), 584 F. Supp. 2d 941 (W.D. Tex. 2008).
- 7 [Michigan Gambling Opposition v. Kempthorne](#), 525 F.3d 23 (D.C. Cir. 2008).
- 8 [Opinion of the Justices to the Senate](#), 422 Mass. 1201, 660 N.E.2d 652 (1996).
- 9 [Usibelli Coal Mine, Inc. v. State, Dept. of Natural Resources](#), 921 P.2d 1134 (Alaska 1996).
- 10 [Hatfield v. New Mexico State Board of Registration for Professional Engineers and Land Surveyors](#), 1955-NMSC-067, 60 N.M. 242, 290 P.2d 1077 (1955); [Public Service Commission v. Norton](#), 304 N.Y. 522, 109 N.E.2d 705 (1952).

Legislative authority often has been delegated with full court approval, and it is not necessary to disguise that action in the form of language that has no verity. [Com. v. Associated Industries of Ky.](#), 370 S.W.2d 584 (Ky. 1963).

11 [Maryland State Police v. Warwick Supply & Equipment Co., Inc.](#), 330 Md. 474, 624 A.2d 1238 (1993).

12 [Ponderosa Ridge LLC v. Banner County](#), 250 Neb. 944, 554 N.W.2d 151 (1996).

13 [Opinion of the Justices to the Senate](#), 422 Mass. 1201, 660 N.E.2d 652 (1996) (holding that the legislature may delegate to a board or officer the authority to work out the details of a policy adopted by the legislature; a detailed specification of standards is not required to ensure the validity of the delegation of legislative authority).

14 [Ponderosa Ridge LLC v. Banner County](#), 250 Neb. 944, 554 N.W.2d 151 (1996).

15 [Kugler v. Yocum](#), 69 Cal. 2d 371, 71 Cal. Rptr. 687, 445 P.2d 303 (1968); [D'Alemberte v. Anderson](#), 349 So. 2d 164 (Fla. 1977).

16 [Thompson v. Smith](#), 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604 (1930).

The legislature, although it may not delegate its power to legislate, may delegate its ministerial authority. [Frach v. Schoettler](#), 46 Wash. 2d 281, 280 P.2d 1038 (1955).

17 [In re Application for Judgment and Sale of Delinquent Properties for Tax Year 1989](#), 167 Ill. 2d 161, 212 Ill. Dec. 215, 656 N.E.2d 1049 (1995).

18 [American Power & Light Co. v. Securities and Exchange Commission](#), 329 U.S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1946).

The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. [Lichter v. U.S.](#), 334 U.S. 742, 68 S. Ct. 1294, 92 L. Ed. 1694 (1948).

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

2. Delegation of Legislative Authority

a. Rule Barring Delegation

§ 318. Limitations on rule barring delegation of legislative authority; permissible delegation—Power to determine facts

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The preliminary ascertainment of facts as a basis for the enactment of legislation is not of itself a legislative function but is simply ancillary to legislation.¹ Thus, the duty to correlate information and make recommendations is the kind of subsidiary activity that the legislature may perform through its own members or which it may delegate to others to perform. Intelligent legislation on the complicated problems of modern society is impossible in the absence of accurate information on the part of the legislators, and any reasonable method for securing that information is proper.²

The Federal Constitution as a continuously operative charter of government does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations that it has declared to be prerequisite to applying legislative policy to particular facts and circumstances that are impossible for Congress itself to properly investigate.³

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Footnotes

¹ [Parker v. Riley](#), 18 Cal. 2d 83, 113 P.2d 873, 134 A.L.R. 1405 (1941).

- 2 The power to ascertain certain facts for the operation of a law is not an improper delegation of legislative power. [Syverson, Rath and Mehrer, P.C. v. Peterson](#), 495 N.W.2d 79 (N.D. 1993).
[Florida Welding & Erection Service, Inc. v. American Mut. Ins. Co. of Boston](#), 285 So. 2d 386 (Fla. 1973);
[State ex rel. State Park and Recreation Commission v. New Mexico State Authority](#), 1966-NMSC-033, 76 N.M. 1, 411 P.2d 984 (1966).
- 3 A state statute authorizing the Public Service Commission to determine the need for a natural gas pipeline and setting forth the criteria to be applied provides sufficient guidelines to overcome any claim of an unconstitutional delegation of power. [Florida Gas Transmission Co. v. Public Service Com'n](#), 635 So. 2d 941 (Fla. 1994).
[Yakus v. U. S.](#), 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

2. Delegation of Legislative Authority

a. Rule Barring Delegation

§ 319. Subdelegation or redelegation of permissibly delegated legislative authority

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑2400

Somewhat analogous to the rule that permits an agent, when expressly authorized by the principal, to subdelegate her authority, there is authority that a permissible delegation of legislative power¹ sometimes may be subdelegated or redelegated.² In some states, however, a redelegation of legislative power is not allowed.³ Without an express congressional authorization for subdelegation, the court must look to the purpose of the statute to set its parameters, although subdelegation generally is permitted when it is not inconsistent with the statute.⁴

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Footnotes

- ¹ When delegation is permissible, see § 317.
- ² [Shreveport Engraving Co. v. U.S.](#), 143 F.2d 222 (C.C.A. 5th Cir. 1944); [State ex rel. Guide Management Corp. v. Alexander](#), 223 Ind. 221, 59 N.E.2d 169 (1945).
- ³ [B.H. v. State](#), 645 So. 2d 987, 46 A.L.R.5th 877 (Fla. 1994) (the state constitution's grant of legislative power to the state legislature embraces both the power to enact laws and the power to declare what the law shall be, and any attempted redelegation violates the constitution).
- ⁴ [Inland Empire Public Lands Council v. Glickman](#), 88 F.3d 697 (9th Cir. 1996), as amended, (July 15, 1996).

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

2. Delegation of Legislative Authority

b. Particular Delegations

(1) In General

§ 320. Delegation of state legislative authority to Congress or federal agency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#) 🔑 2433

The principle is firmly established that a state legislature has no authority to delegate any of its legislative powers to the Congress of the United States¹ or to a federal agency or officer.² Thus, it is generally held that the adoption, by or under authority of a state statute, of prospective federal legislation or federal administrative rules thereafter to be passed constitutes an unconstitutional delegation of legislative power.³ There is, however, authority to the contrary holding that no unconstitutional delegation of authority inheres in a state statute providing that prospective federal legislation will control.⁴ Furthermore, it has been held that a state legislature does not invalidly delegate its legislative authority by adopting a law or rule of Congress if that law already exists or is operative.⁵

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Footnotes

- 1 [Wallace v. Commissioner of Taxation](#), 289 Minn. 220, 184 N.W.2d 588 (1971); [Smithberger v. Banning](#), 129 Neb. 651, 262 N.W. 492, 100 A.L.R. 686 (1935); [Darweger v. Staats](#), 267 N.Y. 290, 196 N.E. 61 (1935).
- 2 [Darweger v. Staats](#), 267 N.Y. 290, 196 N.E. 61 (1935); [City of Cleveland v. Piskura](#), 145 Ohio St. 144, 30 Ohio Op. 340, 60 N.E.2d 919 (1945).

- 3 [Crowly v. Thornbrough](#), 226 Ark. 768, 294 S.W.2d 62 (1956); [Hutchins v. Mayo](#), 143 Fla. 707, 197 So. 495, 133 A.L.R. 394 (1940); [Dawson v. Hamilton](#), 314 S.W.2d 532 (Ky. 1958).
Adoption of an act of Congress to be passed in the future would be an unconstitutional attempt by the state legislature to delegate legislative authority to Congress. [Clemens v. Harvey](#), 247 Neb. 77, 525 N.W.2d 185 (1994).
- 4 [People ex rel. Pratt v. Goldfogle](#), 242 N.Y. 277, 151 N.E. 452 (1926); [Com. v. Alderman](#), 275 Pa. 483, 119 A. 551 (1923).
A statute expanding Medicaid eligibility within the state did not unconstitutionally delegate future lawmaking power to the federal government, even though the federal government could change either the designated poverty level or Medicaid income requirements. [Regan v. Denney](#), 165 Idaho 15, 437 P.3d 15 (2019).
- 5 [Brock v. Superior Court in and for Los Angeles County](#), 9 Cal. 2d 291, 71 P.2d 209, 114 A.L.R. 127 (1937); [Florida Indus. Com'n v. State ex rel. Orange State Oil Co.](#), 155 Fla. 772, 21 So. 2d 599 (1945); [Featherstone v. Norman](#), 170 Ga. 370, 153 S.E. 58, 70 A.L.R. 449 (1930).
Statutory provisions requiring verification of immigration status through a "query to Law Enforcement Support Center of the United States Department of Homeland Security or other office or agency designated for that purpose by the United States Department of Homeland Security" and that if the prisoner's status could not be verified, the jail keeper or other officer "shall notify the United States Department of Homeland Security," did not amount to impermissible delegation of authority to the federal government, in violation of the state constitution's separation of powers doctrine, as the statute recognized the federal government's authority to regulate immigration matters and merely sought cooperation with the federal government. [Thomas v. Henry](#), 2011 OK 53, 260 P.3d 1251 (Okla. 2011).
A legislature's attempt to substantially implement the requirements of the federal Adam Walsh Child Protection and Safety Act of 2006 in order to receive federal funds by bringing North Carolina's conditions for removal from the sex offender registry in line with those recommended under the Adam Walsh Act and other federal standards applicable to registration did not constitute an unlawful delegation of the legislature's authority, as the legislature was not creating a framework and then asking Congress or another federal agency to determine facts or fill in the framework. [In re McClain](#), 226 N.C. App. 465, 741 S.E.2d 893 (2013).

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

2. Delegation of Legislative Authority

b. Particular Delegations

(1) In General

§ 321. Delegation of legislative authority by Congress to state legislatures

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2400, 2435 to 2440

West's Key Number Digest, [States](#)  4, 4.4(1) to 4.4(3), 4.16(1) to 4.16(3)

Congress cannot by delegation enlarge the powers of the states, although it may provide for state regulation by divesting articles of their interstate character at an earlier time than would otherwise be the case.¹ Many omissions or commissions of Congress have been unsuccessfully attacked on this ground. Thus, with respect to a subject matter over which Congress and the states may exercise a concurrent power, but from the exercise of which Congress may exclude the states, Congress may, without unlawfully delegating its power, withhold the exercise of its paramount power and leave the states free to act,² and undue delegation of federal legislative authority has been held not to be involved in state action in aid of federal legislation³ or supplementary to it.⁴

In line with the foregoing rule, a federal statute that governs interstate wagering on horseracing does not violate separation of power principles or the nondelegation doctrine even if the act does effect a "delegation" of sorts of legislative power to the states.⁵ A federal statute making it unlawful to deal in any fish or wildlife taken in violation of any state law or regulation does not unconstitutionally delegate federal legislative authority to the states or their agencies, as the statute's enforcement provisions involve no true delegation of Congress' power.⁶ Congress also does not improperly delegate authority to the states to define the elements of a federal crime in penalizing the possession of a firearm by a person convicted of a crime punishable by imprisonment for a term exceeding one year even though the states might vary in classifying criminal behavior as felonious,

as Congress defined the elements of the federal offense by prohibiting firearm possession by anyone that any state determined to be a felon.⁷ One federal court of appeals has even ruled that the separation of powers principle—and thus the nondelegation doctrine—simply are not implicated by Congress' "delegation" of power to the states because that delegation in fact furthers the core constitutional value of federalism.⁸ Although a power of eminent domain that is purely federal in its nature may not be delegated by Congress to a state, the ascertainment of the amount of compensation to be paid for property appropriated in federal proceedings may be reckoned in accordance with the law of the state in which the property happens to be situated, without an invalid delegation of congressional authority.⁹

Congress may adopt, for application to federal territory located within state boundaries, future criminal legislation of the state in which the territory is located.¹⁰ Congress may adopt later state legislation concerning actions for injuries occurring within the territory under its jurisdiction within the boundaries of the state.¹¹ No impermissible delegation by Congress of its own power to a state agency occurs when Congress accepts a state's action as a condition upon which its exercise of power is to become effective,¹² and no unconstitutional delegation by Congress of its power to the states is involved in an act of Congress declaring that the continued regulation and taxation by the several states of a certain business is in the public interest and that the business is subject to the laws of the several states that relate to its regulation or taxation.¹³

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Footnotes

- 1 [Whitfield v. State of Ohio](#), 297 U.S. 431, 56 S. Ct. 532, 80 L. Ed. 778 (1936); [Wilkerson v. Rahrer](#), 140 U.S. 545, 11 S. Ct. 865, 35 L. Ed. 572 (1891).
- 2 [Van Allen v. The Assessors](#), 70 U.S. 573, 18 L. Ed. 229, 1865 WL 10724 (1865).
- 3 [Kramer v. U.S.](#), 245 U.S. 478, 38 S. Ct. 168, 62 L. Ed. 413 (1918); [Jones v. Perkins](#), 245 U.S. 390, 38 S. Ct. 166, 62 L. Ed. 358 (1918); [Arver v. U.S.](#), 245 U.S. 366, 38 S. Ct. 159, 62 L. Ed. 349 (1918).
- 4 [Butte City Water Co. v. Baker](#), 196 U.S. 119, 25 S. Ct. 211, 49 L. Ed. 409 (1905).
- 5 [Kentucky Div., Horsemen's Benev. & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.](#), 20 F.3d 1406, 1994 FED App. 0107P (6th Cir. 1994).
- 6 [U.S. v. Guthrie](#), 50 F.3d 936 (11th Cir. 1995).
- 7 [U.S. v. McKenzie](#), 99 F.3d 813 (7th Cir. 1996).
- 8 [Kentucky Div., Horsemen's Benev. & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.](#), 20 F.3d 1406, 1994 FED App. 0107P (6th Cir. 1994).
- 9 [U.S. v. Jones](#), 109 U.S. 513, 3 S. Ct. 346, 27 L. Ed. 1015 (1883).
- 10 [U.S. v. Sharpnack](#), 355 U.S. 286, 78 S. Ct. 291, 2 L. Ed. 2d 282 (1958) (upholding the constitutionality of the Assimilative Crimes Act of 1948, which provides that persons within federal enclaves who are guilty of acts or omissions that are not punishable under federal laws but which are punishable under laws in force in the state in which the enclave is located at the time of the acts or omissions in question are guilty of a like offense and subject to a like punishment).
- 11 [Murray v. Joe Gerrick & Co.](#), 291 U.S. 315, 54 S. Ct. 432, 78 L. Ed. 821, 92 A.L.R. 1259 (1934).
- 12 [Gauley Mountain Coal Co. v. Director of U.S.B. of Mines](#), 224 F.2d 887 (4th Cir. 1955).
- 13 [Prudential Ins. Co. v. Benjamin](#), 328 U.S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342, 164 A.L.R. 476 (1946) (involving the McCarran Act, 15 U.S.C.A. §§ 1011 to 1015), relating to the business of insurance.

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b. Particular Delegations

(1) In General

§ 322. Delegation of legislative authority to the electorate or people at large

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2400, 2442, 2445

The legislature may not escape its duties and responsibilities by delegating its legislative authority to the people at large.¹ Thus, a state legislature may not delegate its power by a referendum to a majority of the voters of a state voting at an election.² The rule is different, however, if the constitution permits such a reference; thus a referendum authorized by a state constitution or legislative body on a question within the scope of the legislative power cannot be characterized as a delegation of power since as a matter of constitutional assumption, all power derives from the people who can delegate it to representative instruments that they create.³ In establishing legislative bodies, the people can reserve to themselves the authority to deal directly with matters that might otherwise be assigned to the legislature.⁴ For example, a statute imposing sales, storage, use, consumption, and service taxes, in part for benefit of state schools, subject to approval of majority of state's electors related to public schools, and thus was within an exception to the general constitutional prohibition against legislative acts being made dependent on approval of any authority other than legislature itself.⁵

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Footnotes

- 1 *Browner v. Curran*, 141 Md. 586, 119 A. 250 (1922); *People ex rel. Unger v. Kennedy*, 207 N.Y. 533, 101
N.E. 442 (1913); *State ex rel. Allison v. Garver*, 66 Ohio St. 555, 64 N.E. 573 (1902).
- 2 *People ex rel. Thomson v. Barnett*, 344 Ill. 62, 176 N.E. 108, 76 A.L.R. 1044 (1931).
The general assembly's delegation to the people of the power to enact or repeal by popular vote a general
tax for education represented a delegation of the power to make law, rather than to execute law, and would
be void in the absence of a constitutional authorization. *Akin v. Director of Revenue*, 934 S.W.2d 295, 114
Ed. Law Rep. 964 (Mo. 1996).
- 3 *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976).
- 4 *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S. Ct. 2358, 49 L. Ed. 2d 132 (1976) (city
charter provision requiring proposed land use changes to be ratified by 55% of the voters).
- 5 *State ex rel. Taft v. Franklin County Court of Common Pleas*, 81 Ohio St. 3d 480, 1998-Ohio-333, 692
N.E.2d 560, 124 Ed. Law Rep. 1042 (1998).

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VII. Departmental Separation of Governmental Powers

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2. Delegation of Legislative Authority

b. Particular Delegations

(2) Delegation to Nongovernmental Persons or Groups

§ 323. Delegation of legislative authority to nongovernmental persons or groups, generally

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West's Key Number Digest

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[Validity of delegation to private persons or organizations of power to appoint or nominate to public office, 97 A.L.R.2d 361](#)

[Validity, under state constitutions, of nonsigner provisions of Fair Trade Laws, 60 A.L.R.2d 420](#)

[Validity of zoning ordinance or similar public regulation requiring consent of neighboring property owners to permit or sanction specified uses or construction of buildings, 21 A.L.R.2d 551](#)

[Delegation of legislative power to nongovernmental agencies as regards prices, wages, and hours, 3 A.L.R.2d 188](#)

In general, the legislative branch of government may not delegate legislative powers or functions to nongovernmental persons or groups,¹ to special public or private commissions,² or to private corporations³ or a group of private corporations.⁴

However, delegations of legislative authority to private persons and entities have in some instances been found constitutional when the legislative purpose is discernible, and there is protection against the arbitrary exercise of power.⁵ Under the

nondelegation doctrine, the legislature may grant regulatory authority to private parties only if there are proper standards, guidelines, and procedural safeguards.⁶ To determine whether a private delegation of legislative power is constitutional, appellate courts consider the following factors, mindful that delegations to private entities are subject to more stringent requirements and less judicial deference than public delegations:⁷

- whether the private delegate's actions are subject to meaningful review by a state agency
- whether the persons affected by the private delegate's actions are adequately represented in the decision-making process
- whether the private delegate's power is limited to making rules
- whether the private delegate has a pecuniary or other personal interest that may conflict with its public function
- whether the private delegate is empowered to define criminal acts or impose criminal sanctions

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Footnotes

- 1 [Blumenthal v. Board of Medical Examiners](#), 57 Cal. 2d 228, 18 Cal. Rptr. 501, 368 P.2d 101 (1962); [Dr. G. H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets](#), 231 La. 51, 90 So. 2d 343, 60 A.L.R.2d 410 (1956); [Anderson v. Carlson](#), 171 Neb. 741, 107 N.W.2d 535, 83 A.L.R.2d 831 (1961); [Stewart v. Utah Public Service Com'n](#), 885 P.2d 759 (Utah 1994).
The delegation of legislative power to a private group or association is constitutionally impermissible. [Robinson v. Kansas State High School Activities Ass'n, Inc.](#), 260 Kan. 136, 917 P.2d 836, 110 Ed. Law Rep. 435 (1996).
- 2 [Specht v. City of Sioux Falls](#), 526 N.W.2d 727 (S.D. 1995) (noting that a clause in the state constitution of the type commonly known as a "ripper clause" declares unconstitutional any legislative delegation of municipal functions to special public or private commissions).
- 3 [Fink v. Cole](#), 302 N.Y. 216, 97 N.E.2d 873 (1951).
- 4 [Darweger v. Staats](#), 267 N.Y. 290, 196 N.E. 61 (1935).
- 5 [Texas Workers' Compensation Com'n v. Patient Advocates of Texas](#), 136 S.W.3d 643 (Tex. 2004).
The legislature's delegation of authority to a private party is not necessarily unconstitutional; once the Legislature has established the law, it may properly delegate the authority to administer or apply the law to private or governmental entities. [Hess Collection Winery v. Agricultural Labor Relations Bd.](#), 140 Cal. App. 4th 1584, 45 Cal. Rptr. 3d 609 (3d Dist. 2006).
- 6 [Entertainment Industry Coalition v. Tacoma-Pierce County Health Dept.](#), 153 Wash. 2d 657, 105 P.3d 985 (2005).
- 7 [City of Santa Fe v. Boudreaux](#), 256 S.W.3d 819 (Tex. App. Houston 14th Dist. 2008).

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2. Delegation of Legislative Authority

b. Particular Delegations

(2) Delegation to Nongovernmental Persons or Groups

§ 324. Delegation of legislative authority to individuals

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2400, 2442, 2445

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[Validity and construction of zoning regulation respecting permissible use as affected by division of lot or parcel by zone boundary line, 58 A.L.R.3d 1241](#)

[Zoning regulations as to gasoline filling stations, 75 A.L.R.2d 168](#)

[Attack on validity of zoning statute, ordinance, or regulation on ground of improper delegation of authority to board or officer, 58 A.L.R.2d 1083](#)

[Validity, construction, and effect of statute or ordinance regulating beauty shops, or beauty culture schools, 56 A.L.R.2d 879](#)

[Validity of public prohibition or regulation of location of cemetery, 50 A.L.R.2d 905](#)

In principle, the legislative branch cannot delegate its legislative powers to individuals. For instance, it cannot delegate to private individuals in regulated industries the authority to establish codes of fair competition.¹ However, the legislature's grant to litigants of the option to select the forum for prosecution of their cases is not a grant of judicial, legislative, or executive

power, and hence, its exercise by a prosecutor does not violate the separation-of-powers doctrine;² but the legislature's authority to prescribe when appellate jurisdiction may be invoked cannot be subject to an open-ended delegation to a private party.³

State statutes requiring that an automobile manufacturer, in order to add dealerships to the market areas of its existing franchisees, must obtain the approval of the state's new motor vehicle board only if an existing franchisee files a protest with the board, and are not invalid as constituting an impermissible delegation of state power to private citizens even though the statutes require the board to delay franchise establishments and relocations only when protested by existing franchisees who have unfettered discretion whether or not to protest; an otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may waive its protection.⁴ However, an attempted delegation of powers to private persons may be repugnant to the Due Process Clause if it permits an arbitrary exercise of powers by those individuals and therefore violates the constitutional requirement of reasonableness.⁵

The rule is frequently encountered in zoning controversies. Some zoning ordinances permit, in specified zones, the construction of particular kinds of buildings or the use of land or buildings for particular purposes where the consent of a stipulated percentage of the adjoining or local property owners is obtained and denies the right to make such construction or use without that consent. The validity of such provisions has been sustained as against the contention that they operate as an improper delegation of legislative powers to private persons.⁶ In order to withstand attack as an impermissible legislative delegation of authority, zoning ordinances that establish criteria for the acceptance of a conditional use must specify the reasons why that use may be denied. A zoning ordinance prohibiting a conditional use permit unless the proposed use does not adversely affect the value of adjacent properties gives sufficient guidance to a zoning board and conditional use applicant as to what facts must be presented to gain approval, and therefore is not an unconstitutional delegation of legislative authority to the board.⁷ However, a statute permitting 40% of the neighboring property owners to file a written protest following adoption of a zoning ordinance, without providing guidelines or standards for testing the adopted ordinance or legislative bypass to allow a review of the protest, has been ruled an unconstitutional delegation of legislative power.⁸

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Footnotes

- 1 [A.L.A. Schechter Poultry Corporation v. U.S.](#), 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A.L.R. 947 (1935).
- 2 [Bishop v. State](#), 265 Ga. 821, 462 S.E.2d 716 (1995).
- 3 [Bushert v. Hughes](#), 1996 OK 21, 912 P.2d 334 (Okla. 1996).
- 4 [New Motor Vehicle Bd. of California v. Orrin W. Fox Co.](#), 439 U.S. 96, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978).
- 5 [State of Washington ex rel. Seattle Title Trust Co. v. Roberge](#), 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210, 86 A.L.R. 654 (1928).
- 6 [Gorham v. Town of Cape Elizabeth](#), 625 A.2d 898 (Me. 1993).
- 7 [Gorham v. Town of Cape Elizabeth](#), 625 A.2d 898 (Me. 1993).
- 8 [Cary v. City of Rapid City](#), 1997 SD 18, 559 N.W.2d 891 (S.D. 1997).

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16A Am. Jur. 2d Constitutional Law § 325

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

2. Delegation of Legislative Authority

b. Particular Delegations

(2) Delegation to Nongovernmental Persons or Groups

§ 325. Delegation of legislative authority to nongovernmental associations, groups, or corporations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2400, 2442, 2445

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[Validity of delegation to private persons or organizations of power to appoint or nominate to public office, 97 A.L.R.2d 361](#)

[Validity, under state constitutions, of nonsigner provisions of Fair Trade Laws, 60 A.L.R.2d 420](#)

[Validity of zoning ordinance or similar public regulation requiring consent of neighboring property owners to permit or sanction specified uses or construction of buildings, 21 A.L.R.2d 551](#)

[Delegation of legislative power to nongovernmental agencies as regards prices, wages, and hours, 3 A.L.R.2d 188](#)

Congress and the state legislatures generally cannot delegate their legislative powers to nongovernmental associations, groups, or corporation; however, the application of this general rule presents a confusing picture. Congress cannot, for example, give a group of coal producers the power to make law and enforce it upon others.¹ However, Congress can pass a law and prescribe the conditions of its application, including in those conditions that the requirement of a favorable vote upon referendum by the

group intimately affected.² Also, Congress may validly delegate to an Indian reservation's tribal council Congress' constitutional authority to control the sale of alcoholic beverages by non-Indians on their fee-patented land located within the boundaries of the Indian reservation.³ A statute governing interstate wagering on horseracing does not unconstitutionally delegate legislative power to private parties even though under the act, approval of the host horsemen's association is required for off-track wagering.⁴ However, a provision of a workers' compensation statute requiring the selection of Workers' Compensation Board members by a committee consisting of representatives chosen by a labor union and a business association is an unconstitutional delegation of legislative authority to private organizations.⁵

The fact that a state legislature allowed a state high school activities commission to make rules for interscholastic athletic competitions did not constitute an unconstitutional delegation of legislative authority by default.⁶ Similarly, an agreement under which a university would participate in managing a public school system was not an unconstitutional delegation of the school committee's authority to a private entity, as the university was a public agent authorized by the state to perform under the agreement.⁷ No unlawful delegation of legislative power to a nongovernmental agency is involved in a statutory scheme that permits a private professional association to recommend to a state agency a member of the profession who is competent to render the professional service that the statutory scheme calls for.⁸

When a legislature incorporates the standards of a private organization into a statutory scheme, the incorporation is not always considered to be an unlawful delegation of legislative power.⁹ On this point, however, there is authority to the effect that a statute so providing is unconstitutional for giving to a private corporation the option to create an offense and that, moreover, it is an invalid delegation of the legislature's authority.¹⁰

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Footnotes

- 1 [Carter v. Carter Coal Co.](#), 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).
- 2 [U.S. v. Rock Royal Co-op.](#), 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939); [Currin v. Wallace](#), 306 U.S. 1, 59 S. Ct. 379, 83 L. Ed. 441 (1939); [Brock v. Superior Court in and for Los Angeles County](#), 9 Cal. 2d 291, 71 P.2d 209, 114 A.L.R. 127 (1937).
- 3 [U. S. v. Mazurie](#), 419 U.S. 544, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975).
- 4 [Kentucky Div., Horsemen's Benev. & Protective Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.](#), 20 F.3d 1406, 1994 FED App. 0107P (6th Cir. 1994).
- 5 [Sedlak v. Dick](#), 256 Kan. 779, 887 P.2d 1119 (1995).
- 6 [Robinson v. Kansas State High School Activities Ass'n, Inc.](#), 260 Kan. 136, 917 P.2d 836, 110 Ed. Law Rep. 435 (1996).
- 7 [Fifty-One Hispanic Residents of Chelsea v. School Committee of Chelsea](#), 421 Mass. 598, 659 N.E.2d 277, 105 Ed. Law Rep. 1223 (1996).
- 8 [Szold v. Outlet Embroidery Supply Co.](#), 274 N.Y. 271, 8 N.E.2d 858 (1937).
- 9 [Madrid v. St. Joseph Hosp.](#), 1996-NMSC-064, 122 N.M. 524, 928 P.2d 250 (1996).
Although the Expanded Lottery Act allowed the state lottery to contract for the management of gaming facilities, there was not an improper delegation of power by the legislature to the casino managers; any management contract had to include provisions for the Racing and Gaming Commission to oversee all lottery gaming facility operations, including internal controls, security facilities, performance of background investigations, determination of qualifications and credentials of employees, contractors, and agents of the managers, auditing of facility revenues, and enforcement of all state laws, since the extensive terms of the Act detailing the purpose, authority, and restrictions on the Racing and Gaming Commission belied any improper delegation of authority. [State ex rel. Six v. Kansas Lottery](#), 286 Kan. 557, 186 P.3d 183 (2008).
- 10 [Jannin v. State](#), 42 Tex. Crim. 631, 51 S.W. 1126 (1899).

An appeal of a disciplinary decision to a Citizen's Review Committee as described in a collective bargaining agreement between a city and a police department constituted an unconstitutional private delegation of legislative authority, as the Committee was subject to the arbitrary exercise of power; hearings described in the collective bargaining agreement were governed by the rules created and interpreted by Committee and contained no requirement that the officer's representative be allowed to attend; the Committee could create rules tailored to reach a particular outcome in each case before it; the appointment process under the collective bargaining agreement allowed the parties to staff the Committee entirely with interested parties; and appointees were not required to be familiar with the rules of evidence, standards governing police conduct, policies, and agreements governing an officer's employment, or the methods or procedures for arbitration. [City of Santa Fe v. Boudreaux](#), 256 S.W.3d 819 (Tex. App. Houston 14th Dist. 2008).

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16A Am. Jur. 2d Constitutional Law § 326

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

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b. Particular Delegations

(2) Delegation to Nongovernmental Persons or Groups

§ 326. Delegation of legislative power to appoint or nominate to public office

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[Validity of delegation to private persons or organizations of power to appoint or nominate to public office, 97 A.L.R.2d 361](#)

The constitutional division or separation of governmental powers of state government has been held by some courts not to have been violated by statutes giving to private persons or organizations the power of appointment¹ or nomination to public office.² Such holdings have been based upon various grounds. Thus, in some jurisdictions, having constitutional provisions to the effect that officers whose election or appointment was not provided for in the constitution were to be chosen in such manner as was prescribed by law, it has been held that the legislature could designate private persons or groups to make such appointments.³ Other courts have determined the validity of legislation granting to private organizations the power to appoint to public office on the basis of whether or not there was a rational and substantial relationship between the organizations and the laws to be administered.⁴ One state supreme court upheld a statute delegating to private organizations the right to appoint to public office

on the ground that it was not a delegation by the legislature of its lawmaking power but merely of the power which it could have exercised itself in an administrative capacity.⁵

Several courts have sustained legislative delegation to private organizations of the power to nominate to public boards because of the former's fitness to select the board members.⁶ However, other courts have held that a legislature's grant to private persons or organizations of the right to appoint to public office was a violation of the constitutional division of the sovereign power among the three branches of government.⁷ One court has held that a legislature may not limit the governor's power of appointment by restricting his or her choice to a list of nominations made by private organizations.⁸

The question is frequently encountered in situations where a state law requires membership in a medical association as a condition of being appointed to a public office. For example, a statute delegating authority to a state medical association of the power to appoint a board of medical examiners was held constitutional where sufficient guidelines were established by the legislature for the medical association's appointments.⁹ However, another state statute dictating membership in a private medical association as a prerequisite to membership on a State Board of Medical Examiners was held void because it unconstitutionally delegated the power of appointment to a private organization,¹⁰ and a statutory provision requiring a state governor to appoint members of a private chiropractic association to a state board of examiners was held invalid because it constituted an unconstitutional delegation of the appointment power to a private organization where the association's ability to control its membership was absolute.¹¹

Under the Appointments Clause of the Federal Constitution,¹² which prescribes the exclusive means of appointing officers of the United States, only the President, a court of law, or a head of department can do so, and only the President, with the advice and consent of the Senate, can appoint a principal officer, but Congress, instead of relying on that method, may authorize the President alone, a court, or a department head to appoint an inferior officer.¹³ No class or type of officer is excluded, because of its special function, from the operation of the Clause,¹⁴ which applies to the appointment of ambassadors and other public ministers and consuls, the justices of the United States Supreme Court, and all other officers of the United States, including cabinet officers, military officers, and military judges,¹⁵ all of whose powers are delegated to them by the President as head of the executive branch.¹⁶ The Appointments Clause is aimed at more than an abstract division of labor between the branches of government; the structural principles secured by the separation of powers protect the individual as well, so a citizen's ability to enforce it through a merits hearing is critical to protecting individual liberty.¹⁷

The term "happen," within the meaning of the Recess Appointments Clause,¹⁸ which gives the President the authority to make recess appointments of United States officers for vacancies that may happen during a Senate recess, refers not only to vacancies that first come into existence during a recess, but also to vacancies that arise prior to a recess but continue to exist during the recess.¹⁹

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Footnotes

- 1 [Opinion of the Justices](#), 114 N.H. 165, 316 A.2d 174 (1974); [Seidenberg v. New Mexico Bd. of Medical Examiners](#), 1969-NMSC-028, 80 N.M. 135, 452 P.2d 469 (1969); [State v. Taylor](#), 223 S.C. 526, 77 S.E.2d 195 (1953).
- 2 [Marks v. Frantz](#), 179 Kan. 638, 298 P.2d 316 (1956).
- 3 [Overshiner v. State](#), 156 Ind. 187, 59 N.E. 468 (1901); [Scholle v. State](#), 90 Md. 729, 46 A. 326 (1900).
- 4 [Parke v. Bradley](#), 204 Ala. 455, 86 So. 28 (1920); [Floyd v. Thornton](#), 220 S.C. 414, 68 S.E.2d 334 (1951).
- 5 [Yeilding v. State ex rel. Wilkinson](#), 232 Ala. 292, 167 So. 580 (1936).

- 6 Elrod v. Willis, 305 Ky. 225, 203 S.W.2d 18 (1947); Bradley v. Board of Zoning Adjustment of City of Boston, 255 Mass. 160, 150 N.E. 892 (1926).
- 7 Opinion of the Justices, 337 Mass. 777, 150 N.E.2d 693 (1958).
A provision in a statute that certain private veterans' organizations had power to appoint commissioners who would control the construction and maintenance of veterans' memorial buildings constituted an impermissible delegation of state power where the commissioners had power to disburse public funds in furtherance of their duties. Gamel v. Veterans Memorial Auditorium Commission, 272 N.W.2d 472 (Iowa 1978).
- 8 Westlake v. Merritt, 85 Fla. 28, 95 So. 662 (1923).
- 9 Evers v. Board of Medical Examiners, 516 So. 2d 650 (Ala. Civ. App. 1987).
- 10 Toussaint v. State Bd. of Medical Examiners, 285 S.C. 266, 329 S.E.2d 433 (1985).
- 11 Gold v. South Carolina Bd. of Chiropractic Examiners, 271 S.C. 74, 245 S.E.2d 117 (1978).
A statute which in effect limited members of a chiropractic examining board and disciplinary board to persons either appointed by or nominated by two chiropractic societies violated the due-process rights of chiropractors who were not members of either society where not all chiropractors were members of the named societies, and suitable safeguards and standards to guide in licensing and disciplinary practices were not provided. United Chiropractors of Washington, Inc. v. State, 90 Wash. 2d 1, 578 P.2d 38 (1978).
- 12 U.S. Const. Art. II, § 2, cl. 2.
- 13 Lucia v. S.E.C., 138 S. Ct. 2044, 201 L. Ed. 2d 464 (2018).
- 14 Weiss v. U.S., 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994).
- 15 Weiss v. U.S., 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994).
The federal appointment power is vested in the President and the Senate's advice and consent power, exercised in the confirmation process, does not turn Presidential appointees into senatorial appointees. Crumpacker v. Kansas, Dept. of Human Resources, 474 F.3d 747 (10th Cir. 2007).
- 16 Weiss v. U.S., 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994).
- 17 Cirko on behalf of Cirko v. Commissioner of Social Security, 948 F.3d 148 (3d Cir. 2020).
- 18 U.S. Const. Art. II, § 2, cl. 3.
- 19 N.L.R.B. v. Noel Canning, 573 U.S. 513, 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014).

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Constitutional Law

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

2. Delegation of Legislative Authority

b. Particular Delegations

(2) Delegation to Nongovernmental Persons or Groups

§ 327. Delegation of legislative authority concerning prices, hours, or wages

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[State power to regulate price of intoxicating liquors, 14 A.L.R.2d 699](#)

[Delegation of legislative power to nongovernmental agencies as regards prices, wages, and hours, 3 A.L.R.2d 188](#)

Statutes that lodge the authority to initiate administrative legislation on prices, wages, or hours exclusively in private groups and limit the power of the appropriate administrative agency to either approve or disapprove that legislation—in some instances even without authorizing them to modify or revise it—have been held invalid as an improper delegation of legislative power in a number of cases.¹ A direct delegation to private groups, individuals, or corporations would thus clearly be invalid.² On the other hand, if a statute authorizes the appropriate administrative agency to enact upon its own initiative legislation on prices, wages, and hours under adequate standards fixed by the statute, it is not subject to the objection that it improperly delegates legislative power to private groups merely because it also authorizes private groups to initiate that legislation.³ or to private corporations.⁴ Further, a statute empowering an administrative agency to enact legislation on those subjects under proper standards fixed

by the statute is not subject to the objection that it constitutes an improper delegation of legislative power to such groups merely because by its terms the administrative legislation is to take effect only upon the consent of certain private groups.⁵ No improper delegation of legislative authority to a private group exists when that group has power only to make nonbinding recommendations to an administrative agency.⁶ Also, statutes permitting manufacturers of trademarked articles to contract with buyers for maintenance of a fixed resale price, violation of which contract is made actionable by any aggrieved person, have been upheld against the objection that the statutes unconstitutionally delegated legislative power.⁷ Nonsigner provisions in fair-trade laws have been upheld as against the claim that they involve a delegation of legislative power to private groups contrary to constitutional guaranties,⁸ although there is contrary authority in this regard.⁹

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Footnotes

- 1 [Chester C. Fosgate Co. v. Kirkland](#), 19 F. Supp. 152 (S.D. Fla. 1937); [Hollingsworth v. State Board of Barber Examiners](#), 217 Ind. 373, 28 N.E.2d 64 (1940); [Maryland Co-op. Milk Producers v. Miller](#), 170 Md. 81, 182 A. 432 (1936); [In re Opinion of the Justices](#), 337 Mass. 796, 151 N.E.2d 631 (1958); [State v. Allstate Ins. Co.](#), 231 Miss. 869, 97 So. 2d 372 (1957); [LaForge v. Ellis](#), 175 Or. 545, 154 P.2d 844 (1945); [Revue v. Trade Commission](#), 113 Utah 155, 192 P.2d 563, 3 A.L.R.2d 169 (1948); [Gibson Auto Co. v. Finnegan](#), 217 Wis. 401, 259 N.W. 420 (1935).
- 2 [Carter v. Carter Coal Co.](#), 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).
Although a statutory procedure for establishing pay rates on public works involved a delegation of legislative power since the collective bargaining agreements used to determine the pay rates had been negotiated by private parties, that delegation was not per se unconstitutional and was reasonable. [Male v. Ernest Renda Contracting Co., Inc.](#), 64 N.J. 199, 314 A.2d 361 (1974).
- 3 [Arnold v. Board of Barber Examiners](#), 1941-NMSC-003, 45 N.M. 57, 109 P.2d 779 (1941); [Jarvis v. State Bd. of Barber Examiners](#), 1938 OK 525, 183 Okla. 527, 83 P.2d 560 (1938).
- 4 [Baughn v. Gorrell & Riley](#), 311 Ky. 537, 224 S.W.2d 436 (1949).
- 5 [U.S. v. Rock Royal Co-op.](#), 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939); [Edwards v. U.S.](#), 91 F.2d 767 (C.C.A. 9th Cir. 1937); [Brock v. Superior Court in and for Los Angeles County](#), 9 Cal. 2d 291, 71 P.2d 209, 114 A.L.R. 127 (1937).
A delegation of the legislature's constitutional authority to regulate hours of work and compensation under the jurisdiction of the Public Employment Relations Board to ad hoc arbitration panels when an impasse occurred in the course of collective bargaining negotiations between a public employer and its firemen and policemen, with specific standards to be followed by the panels, was proper and reasonable. [City of Amsterdam v. Helsby](#), 37 N.Y.2d 19, 371 N.Y.S.2d 404, 332 N.E.2d 290 (1975).
- 6 [Associated Industries of Oklahoma v. Industrial Welfare Commission](#), 1939 OK 155, 185 Okla. 177, 90 P.2d 899 (1939).
- 7 [Old Dearborn Distributing Co. v. Seagram-Distillers Corporation](#), 299 U.S. 183, 57 S. Ct. 139, 81 L. Ed. 109, 106 A.L.R. 1476 (1936); [Ed. Schuster & Co. v. Steffes](#), 237 Wis. 41, 295 N.W. 737, 133 A.L.R. 1071 (1941).
- 8 [Skaggs Drug Center, Inc. v. U. S. Time Corp.](#), 101 Ariz. 392, 420 P.2d 177 (1966); [Warner Stores Co. v. E. R. Squibb & Sons, Inc.](#), 43 Del. Ch. 129, 219 A.2d 579 (1966); [Luskin's Inc. v. U. S. Pioneer Electronics Corp.](#), 26 Md. App. 711, 338 A.2d 396 (1975), cert. granted, cause remanded on other grounds, 276 Md. 746 (1975); [Plough, Inc. v. Hogue & Knott Super Market](#), 211 Tenn. 480, 365 S.W.2d 884 (1963).
- 9 [Olin Mathieson Chemical Corp. v. Francis](#), 134 Colo. 160, 301 P.2d 139 (1956); [Bissell Carpet Sweeper Co. v. Shane Co.](#), 237 Ind. 188, 143 N.E.2d 415 (1957); [Bulova Watch Co. v. Robinson Wholesale Co.](#), 252 Iowa 740, 108 N.W.2d 365 (1961); [Quality Oil Co. v. E. I. Du Pont De Nemours & Co.](#), 182 Kan. 488, 322 P.2d 731 (1958); [Corning Glass Works v. Ann & Hope, Inc. of Danvers](#), 363 Mass. 409, 294 N.E.2d 354 (1973); [Remington Arms Co. v. G. E. M. of St. Louis, Inc.](#), 257 Minn. 562, 102 N.W.2d 528 (1960); [Bulova Watch Co., Inc. v. Brand Distributors of North Wilkesboro, Inc.](#), 285 N.C. 467, 206 S.E.2d 141 (1974); [American Home Products Corp. v. Homsey](#), 1961 OK 91, 361 P.2d 297 (Okla. 1961); [House of Seagram, Inc. v. Assam](#)

[Drug Co.](#), 85 S.D. 27, 176 N.W.2d 491 (1970); [Bulova Watch Co. v. Zale Jewelry Co. of Cheyenne](#), 371 P.2d 409 (Wyo. 1962).

The Pennsylvania Fair Trade Act, as applied to nonsigners of price maintenance contracts is unconstitutional as vesting in private persons a discretionary regulatory power over prices without any intelligent standards of control. [Olin Mathieson Chemical Corp. v. White Cross Stores, Inc.](#), No. 6, 414 Pa. 95, 199 A.2d 266 (1964). The Fair Trade Act is not an unlawful delegation of legislative power as applied to a nonsigning reseller who purchases with actual notice of a stipulated minimum resale price imposed pursuant to the Act; however, it is an unlawful delegation of that power as applied to a reseller who purchases without actual notice of that price. [U. S. Time Corp. v. Ann & Hope Factory Outlet, Inc.](#), 98 R.I. 503, 205 A.2d 125 (1964).

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VII. Departmental Separation of Governmental Powers

E. Delegation of Powers

2. Delegation of Legislative Authority

b. Particular Delegations

(3) Delegation to Other Governmental Departments or Agencies

§ 328. Delegation of legislative authority to executive

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[Validity of delegation to Drug Enforcement Administration of authority to schedule or reschedule drugs subject to Controlled Substances Act \(21 U.S.C.A. secs. 801 et seq.\), 47 A.L.R. Fed. 869](#)

The legislature of a state generally cannot transfer or delegate to the governor any strictly legislative powers,¹ such as the authority to create offices,² and any legislative action vesting executive branch agencies with the authority to determine the constitutionality of a statute would violate the separation of powers doctrine.³

The general principle that Congress cannot delegate its strictly legislative powers to the President is universally recognized as vital to the integrity and maintenance of the Constitutional system of government.⁴ However, on countless occasions, the legislative branch does delegate to the executive branch the authority to enforce the laws made by Congress by issuing

administrative rules and regulations; such executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require it.⁵ In other words, the fundamental precept of the delegation doctrine under separation-of-powers jurisprudence is that the lawmaking function belongs to Congress and may not be conveyed to another branch or entity, but that principle does not mean that only Congress can make a rule of prospective force since Congress must be permitted to delegate to others at least some authority that it could exercise itself.⁶

The separation-of-powers principles does not preclude Congress from delegating its constitutional authority to make rules for governing the military to the President to define aggravating factors that permit the imposition of the statutory penalty of death in military capital cases with regulations providing the narrowing of the death-eligible class required by the Eighth Amendment. Congress exercises the power of precedence over, not the exclusion of, executive authority, and a special limit on this congressional power would be contrary to the highest deference given to Congress in ordering military affairs and contrary to the respect owed to the President as Commander-in-Chief. Furthermore, no absolute rule bars Congress' delegation of authority to define criminal punishments, and the exercise of delegated authority to define crimes may be sufficient in certain circumstances to supply the notice to defendants that the Constitution requires.⁷ Congress, under some circumstances, may delegate its authority to define criminal punishments to the executive branch.⁸ Additionally, a statute providing prosecutorial discretion to proceed against a juvenile over the age of 14 charged with a violent felony in either juvenile court or as an adult in district court does not violate the separation of powers doctrine under a state constitution.⁹

Observation:

Legislative delegations of power to an executive body historically require a clear delineation of legislative policy and substantive standards to guide the agency in the implementation of policy; but precise substantive guidelines or standards are not required in the legislation if adequate procedural safeguards are provided that advance the legislature's purpose and preclude arbitrary, capricious, or illegal conduct by the agency.¹⁰ The character of the administrative agency is also important in testing a statute for adequacy of standards to determine whether the statute involves an unlawful delegation of legislative authority in violation of the separation of powers doctrine; the sufficiency of the standards varies according to the complexity of areas sought to be regulated.¹¹ The holder of regulatory powers delegated from Congress is entitled to fill in gaps and resolve ambiguities in the statute.¹²

The rule regarding the impermissibility of any delegation of legislative power to the executive branch is subject to some qualification. A statute delegating authority to the Attorney General to schedule a controlled substance on a temporary basis does not violate the principle of separation of powers by concentrating too much power in the hands of the Attorney General who also wields the power to prosecute crimes; the separation of powers principle focuses on the distribution of powers among the three coequal branches of government and does not speak to the manner in which Congress parcels out its authority within the executive branch.¹³ Also, a statute permitting the Secretary of Transportation to establish a system of user fees to cover the costs of administering certain federal pipeline safety programs was not unconstitutional.¹⁴ The legislature may confer upon executive officers and administrative agencies discretion over the execution of a law, which is to be exercised under and in pursuance of the law,¹⁵ and once it has delegated that discretion, the legislature may not unilaterally control the execution of rulemaking authority after its delegation of rulemaking power, regardless of whether it does so by suspension, revocation, or

prior approval of administrative rules.¹⁶ However, administrative agencies owe their existence to the legislature which retains plenary power over them, and thus if the legislature concludes that it has given away too much authority, it may by statute take it back or may in the future enact more specific delegations.¹⁷

Congress may properly delegate a mere executive duty to effectuate its legislative policy.¹⁸ Moreover, the powers delegated to the President¹⁹ or a member of the executive department may be appropriate to meet any attack of unconstitutional delegation of legislative power,²⁰ or the standards established by the legislature may be sufficient to meet such a constitutional challenge.²¹

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Footnotes

- 1 [Langworthy v. Kadel](#), 141 Kan. 250, 40 P.2d 443 (1935); [Opinion of the Justices](#), 315 Mass. 761, 52 N.E.2d 974, 150 A.L.R. 1482 (1944).
- 2 [State v. Butler](#), 105 Me. 91, 73 A. 560 (1909).
- 3 [Richardson v. Tennessee Bd. of Dentistry](#), 913 S.W.2d 446 (Tenn. 1995).
- 4 [A.L.A. Schechter Poultry Corporation v. U.S.](#), 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A.L.R. 947 (1935); [Panama Refining Co. v. Ryan](#), 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935); [O'Neal v. U.S.](#), 140 F.2d 908, 151 A.L.R. 1474 (C.C.A. 6th Cir. 1944).
- 5 [I.N.S. v. Chadha](#), 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) (noting that this kind of executive action is always subject to check by the terms of the legislation that authorized it, and if that authority is exceeded, it is open to judicial review, as well as the power of Congress to modify or revoke the authority entirely).
- 6 [Loving v. U.S.](#), 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996).
- 7 [Loving v. U.S.](#), 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996).
- 8 [Loving v. U.S.](#), 517 U.S. 748, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996); [Matter of C.A.](#), 146 N.J. 71, 679 A.2d 1153 (1996) (a delegation of power in a state's sex offenders' Registration Law and Community Notification Law ("Megan's Law") to a state attorney general to identify other factors relevant to the risk of reoffending is constitutionally proper).
- 9 [Hansen v. State](#), 904 P.2d 811 (Wyo. 1995).
- 10 [In Interest of C.S.](#), 516 N.W.2d 851 (Iowa 1994).
- 11 [State v. Ponce](#), 258 Kan. 708, 907 P.2d 876 (1995).
- 12 [NBD Bank, N.A. v. Bennett](#), 67 F.3d 629 (7th Cir. 1995).
- 13 [Touby v. U.S.](#), 500 U.S. 160, 111 S. Ct. 1752, 114 L. Ed. 2d 219 (1991).
- 14 [Skinner v. Mid-America Pipeline Co.](#), 490 U.S. 212, 109 S. Ct. 1726, 104 L. Ed. 2d 250 (1989).
- 15 [Teeval Co. v. Stern](#), 301 N.Y. 346, 93 N.E.2d 884 (1950); [Bailey v. State Bd. of Public Affairs](#), 1944 OK 301, 194 Okla. 495, 153 P.2d 235 (1944); [Com., Dept. of Labor and Industry v. Altemose Const. Co.](#), 28 Pa. Commw. 277, 368 A.2d 875 (1977).
- 16 [Missouri Coalition for Environment v. Joint Committee on Administrative Rules](#), 948 S.W.2d 125 (Mo. 1997), as modified on denial of reh'g, (Feb. 25, 1997).
- 17 [Matter of Adoption of Regulations Governing State Health Plan](#), N.J.A.C. 8:100, 135 N.J. 24, 637 A.2d 1246 (1994).
- 18 [Union Bridge Co. v. U S](#), 204 U.S. 364, 27 S. Ct. 367, 51 L. Ed. 523 (1907); [Varney v. Warehime](#), 147 F.2d 238 (C.C.A. 6th Cir. 1945); [Board of Com'rs of Pawnee County, Okl. v. U.S.](#), 139 F.2d 248 (C.C.A. 10th Cir. 1943).
- 19 [Federal Energy Administration v. Algonquin SNG, Inc.](#), 426 U.S. 548, 96 S. Ct. 2295, 49 L. Ed. 2d 49 (1976) (the standards provided to the President by the Trade Expansion Act of 1962 (19 U.S.C.A. § 1862(b))—authorizing the President to adjust the imports of articles so that they will not threaten the national security—are sufficient to meet any attack of unconstitutional delegation of legislative power); [J.W. Hampton, Jr., & Co. v. U.S.](#), 276 U.S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (Cust. App. 1928); [Silesian-American Corp. v.](#)

- 20 Markham, 156 F.2d 793 (C.C.A. 2d Cir. 1946), judgment *aff'd*, 332 U.S. 469, 68 S. Ct. 179, 92 L. Ed. 81 (1947).
U.S. v. Chemical Foundation, 272 U.S. 1, 47 S. Ct. 1, 71 L. Ed. 131 (1926); Rodgers v. U.S., 138 F.2d 992 (C.C.A. 6th Cir. 1943); Nicoli v. Briggs, 83 F.2d 375 (C.C.A. 10th Cir. 1936); National Psychological Ass'n for Psychoanalysis, Inc. v. University of State of N.Y., 8 N.Y.2d 197, 203 N.Y.S.2d 821, 168 N.E.2d 649 (1960).
- 21 Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 109 S. Ct. 1726, 104 L. Ed. 2d 250 (1989).

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VII. Departmental Separation of Governmental Powers

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§ 329. Delegation of legislative authority to executive—Executive power as to international or external affairs of United States

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2400, 2406 to 2442

In internal affairs, Congress must retain the lawmaking power given to it in the enumerated grants of the Federal Constitution and cannot abdicate its functions to the executive department.¹ Quite a different principle applies, however, to matters that are solely external and in which the authority of the United States is exercised as a sovereign nation in the field of international relations.² The nuances of foreign policy are more the province of the executive branch and Congress than of the Supreme Court.³ In light of the changeable and explosive nature of contemporary international relations and the fact that the executive is immediately privy to information that cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the executive authority over matters of foreign affairs—must of necessity paint with a brush broader than it customarily wields in domestic areas; this does not mean, however, that simply because a statute deals with foreign relations, it can grant the executive a totally unrestricted freedom of choice to act in this area.⁴

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Footnotes

¹ [§ 328.](#)

- 2 U.S. v. Curtiss-Wright Export Corporation, 299 U.S. 304, 57 S. Ct. 216, 81 L. Ed. 255 (1936); Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431 (9th Cir. 1996) (Cuban Asset Control Regulations are not an impermissible delegation of congressional power despite a contention that the "in the national interest" standard is too broad a delegation).
- 3 ITEL Containers Intern. Corp. v. Huddleston, 507 U.S. 60, 113 S. Ct. 1095, 122 L. Ed. 2d 421 (1993).
- 4 Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965).

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2400, 2403, 2404

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[Constitutionality of arbitration statutes](#), 55 A.L.R.2d 432

One important application of the principle of the separation of governmental powers and their allotment to the three departments of government is the rule prohibiting any vesting of legislature power in the judiciary. The legislative branch cannot delegate or confer legislative power on the courts or impose legislative duties upon them because those duties are not judicial in nature.¹ An act of the legislature delegating legislative powers to courts is unconstitutional.² Thus, a court cannot be empowered to engage in zoning³ or made to issue licenses.⁴

Consistent with the separation of powers, however, Congress may delegate to the judicial branch nonadjudicatory functions that do not trench upon the prerogatives of another branch and that are appropriate to the central mission of the judiciary.⁵ Thus,

delegation to a court of the power to ascertain a state of facts under which a statute applies is not an unlawful delegation of legislative power to the judiciary,⁶ and the legislature may provide for the appointment of court assistants and the fixing of their compensation by the executive department or by the courts themselves, and in so doing, it is not delegating legislative power to another but is in fact authorizing only an executive or ministerial act.⁷ Furthermore, the deliberate delegation to the judiciary of a legislative power that is in keeping with its judicial responsibilities⁸ or a duty that is judicial or quasi-judicial in nature is not subject to the constitutional stricture.⁹

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Footnotes

- 1 [Burnett v. Greene](#), 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244 (1929); [Opinion of the Justices](#), 279 Mass. 607, 180 N.E. 725, 81 A.L.R. 1059 (1932); [Searle v. Yensen](#), 118 Neb. 835, 226 N.W. 464, 69 A.L.R. 257 (1929); [State v. Roy](#), 1936-NMSC-048, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1 (1936); [People ex rel. Emigrant Industrial Sav. Bank v. Sexton](#), 284 N.Y. 57, 29 N.E.2d 469 (1940).
The legislature cannot commit to the judiciary powers that are primarily legislative. [Application of Dailey](#), 195 W. Va. 330, 465 S.E.2d 601 (1995).
- 2 [Burnett v. Greene](#), 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244 (1929); [Searle v. Yensen](#), 118 Neb. 835, 226 N.W. 464, 69 A.L.R. 257 (1929); [Gutierrez v. Middle Rio Grande Conservancy Dist.](#), 1929-NMSC-071, 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929); [Columbus, Delaware & Marion Elec. Co. v. Board of Com'rs of Marion County](#), 118 Ohio St. 501, 6 Ohio L. Abs. 327, 161 N.E. 538 (1928); [State v. Huber](#), 129 W. Va. 198, 40 S.E.2d 11, 168 A.L.R. 808 (1946).
Setting rates and fees for sewer or water services is a nondelegable legislative function, and a statute providing for special court discretion in the imposition of terms and conditions on the right to reversion of a city to town status did not confer upon the special court authority to fix water and sewer rates. [City of South Boston v. Halifax County](#), 247 Va. 277, 441 S.E.2d 11 (1994).
A statutory amendment allowing the district court to impose an educational necessity levy violated the separation of powers provision of the state constitution because the amendment assigned the authority to tax to the judiciary. [Idaho Schools For Equal Educational Opportunity v. State](#), 140 Idaho 586, 97 P.3d 453, 191 Ed. Law Rep. 876 (2004).
- 3 [Coe v. City of Albuquerque](#), 1966-NMSC-196, 76 N.M. 771, 418 P.2d 545 (1966) (whether zoning is held to be a legislative or an administrative function, it is a function to be exercised by a department of government other than the judiciary and to the extent that a statute purports to allow the trial court to zone land, it is void as an unconstitutional delegation of power to the judiciary).
- 4 [Application of Dailey](#), 195 W. Va. 330, 465 S.E.2d 601 (1995) (a statute that requires a circuit court to issue a license to carry a concealed deadly weapon once an applicant demonstrates that the "qualifiers" are satisfied constitutes a legislative delegation of powers and duties to various courts which are nonjudicial in character, are not incidental to the judicial function, and violate the separation of powers clause of the state constitution).
- 5 [Mistretta v. U.S.](#), 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989); [U.S. v. Lujan](#), 504 F.3d 1003 (9th Cir. 2007).
- 6 [Bishop v. State](#), 265 Ga. 821, 462 S.E.2d 716 (1995).
When the general assembly delegates the power to determine whether a state of facts may constitute a crime, it must provide sufficiently precise standards to guide a judge or jury in deciding whether a crime has been committed. [People v. Baker](#), 45 P.3d 753 (Colo. App. 2001), as modified on denial of reh'g, (Nov. 1, 2001).
- 7 [Rivas v. Los Angeles County](#), 195 Cal. App. 2d 406, 15 Cal. Rptr. 829 (2d Dist. 1961).
- 8 [Pringle v. Wolfe](#), 88 N.Y.2d 426, 646 N.Y.S.2d 82, 668 N.E.2d 1376 (1996).
- 9 [Frazier v. Moffatt](#), 108 Cal. App. 2d 379, 239 P.2d 123 (2d Dist. 1951).

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§ 331. Delegation of legislative authority to political subdivisions

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2400, 2435 to 2440

It is a well-settled rule that the general doctrine prohibiting the delegation of legislative authority has no application to the vesting in political subdivisions of powers to govern matters that are local in scope. For a great variety of purposes and governmental functions, the legislature may delegate a part of its power over local subjects to municipal corporations, counties,¹ and other public bodies within the legislative classification of departments.² Thus, for instance, legislative authorization allowing a county commission to grant a municipal annexation through a minor boundary adjustment is a proper delegation of legislative authority.³ In addition to the most frequent exercise of this power, in the case of municipalities,⁴ this principle has been employed to sustain a delegation of powers ordinarily exercisable only by the legislature to such subdivisions as towns,⁵ park commissions,⁶ school districts,⁷ and counties or county boards.⁸

In some instances, however, the provisions of state constitutions either forbid the delegation of power to certain boards or permit those powers to be exercised only by specified subdivisions. For example, a legislature in one state was held unable to constitutionally delegate to counties the authority to determine the number of magistrates they wished to fund.⁹ Similarly, a statute that created a library district and permitted the appointed trustees of the district to set the town tax rate was invalid because it unconstitutionally delegated the authority to tax to the library district's trustees.¹⁰

Footnotes

- 1 [Petition of City of Beckley to Annex, by Minor Boundary Adjustment, West Virginia Route 3 Right-of-Way Beginning at Present Corporate Limits, 194 W. Va. 423, 460 S.E.2d 669 \(1995\)](#) (the legislature has authority to delegate law-making power to counties as to matters of local concern; such delegation does not violate the separation of powers doctrine).
Under state constitutional provision stating that the people, by their legal representatives, have sole right of regulating police, legislature possesses the authority to delegate the police power to other state or municipal instrumentalities. [State v. Curley-Egan, 180 Vt. 305, 2006 VT 95, 910 A.2d 200, 214 Ed. Law Rep. 682 \(2006\)](#).
- 2 [State v. Heitz, 72 Idaho 107, 238 P.2d 439 \(1951\)](#); [Koelling v. Board of Trustees of Mary Frances Skiff Memorial Hospital, 259 Iowa 1185, 146 N.W.2d 284 \(1966\)](#); [City of Alexandria v. Alexandria Fire Fighters Ass'n, Local No. 540, 220 La. 754, 57 So. 2d 673 \(1952\)](#); [City of Milwaukee v. Sewerage Commission of City of Milwaukee, 268 Wis. 342, 67 N.W.2d 624 \(1954\)](#); [Board of Trustees of Memorial Hospital of Sheridan County v. Pratt, 72 Wyo. 120, 262 P.2d 682 \(1953\)](#).
- 3 [Petition of City of Beckley to Annex, by Minor Boundary Adjustment, West Virginia Route 3 Right-of-Way Beginning at Present Corporate Limits, 194 W. Va. 423, 460 S.E.2d 669 \(1995\)](#).
- 4 [§ 332](#).
- 5 [Green Point Sav. Bank v. Board of Zoning Appeals of Town of Hempstead, 281 N.Y. 534, 24 N.E.2d 319 \(1939\)](#); [Cook-Johnson Realty Co. v. Bertolini, 15 Ohio St. 2d 195, 44 Ohio Op. 2d 160, 239 N.E.2d 80 \(1968\)](#).
- 6 [Vallely v. Board of Park Com'rs of Park Dist. of City of Grand Forks, 16 N.D. 25, 111 N.W. 615 \(1907\)](#).
- 7 [American Federation of Teachers, Yakima Local 1485 v. Yakima School Dist. No. 7, 74 Wash. 2d 865, 447 P.2d 593 \(1968\)](#).
- 8 [Ogle v. Eckel, 49 Cal. App. 2d 599, 122 P.2d 67 \(4th Dist. 1942\)](#); [Asphalt Paving Co. v. County Com'rs of Jefferson County, 162 Colo. 254, 425 P.2d 289 \(1967\)](#); [State ex rel. Crim v. Juvenal, 119 Fla. 86, 121 Fla. 69, 163 So. 569 \(1935\)](#).
- 9 [Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 \(1996\)](#).
- 10 [Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie, 81 N.Y.2d 574, 601 N.Y.S.2d 94, 618 N.E.2d 127 \(1993\)](#).

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§ 332. Delegation of legislative authority to political subdivisions—Municipal corporations

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West's Key Number Digest

West's Key Number Digest, [Constitutional Law](#)  2400, 2435 to 2440

The constitutional maxim that prohibits the legislature from delegating its power to any other body or authority is not violated by vesting municipal corporations with certain powers of legislation concerning matters of purely local concern of which the parties immediately interested are supposed to be better judges than the legislature.¹ Duly enacted ordinances passed under such delegated powers have the force of laws as if passed by the legislature.² The legislative power granted or delegated by the state to a municipality is not lodged in the common council, commission, or other local legislative body or in any other officers or agents of the city but in the city as a body politic. It follows that there is no constitutional inhibition against that power being exercised by a municipality's voters under initiative or referendum measures.³

Despite the broad application of the principle that legislative power may be delegated, it has its limitations. Hence, delegation cannot be made of an exclusive power over a matter whose control has been lawfully vested in (and not withdrawn from) another branch of the government.⁴ Even though the delegation of legislative power over a limited section of the state to a municipal corporation is constitutional, the class of powers so delegated must encompass matters that form appropriate subjects of municipal regulation.⁵ Furthermore, in delegating power to a municipality to exercise discretion in a certain matter, the legislature must prescribe fixed or specific standards for making the determinations that involve the use of that discretion.⁶ However, a legislature delegating its power to make laws to local governing bodies must impose adequate standards to guide

the discretion of those bodies.⁷ The existence of an area for the exercise of discretion by a municipality, under delegation of authority from the legislature to enforce and apply law, does not render the delegation unlawful if the standards formulated for guidance, though general, are capable of reasonable application.⁸

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Footnotes

- 1 [Home Tel. & Tel. Co. v. City of Los Angeles](#), 211 U.S. 265, 29 S. Ct. 50, 53 L. Ed. 176 (1908); [City of Lowell v. M & N Mobile Home Park, Inc.](#), 323 Ark. 332, 916 S.W.2d 95 (1996); [Petition of City of Beckley to Annex, by Minor Boundary Adjustment, West Virginia Route 3 Right-of-Way Beginning at Present Corporate Limits](#), 194 W. Va. 423, 460 S.E.2d 669 (1995).
- 2 [New Orleans Water Works Co. v. City of New Orleans](#), 164 U.S. 471, 17 S. Ct. 161, 41 L. Ed. 518 (1896). Part of the police power of the state may be delegated by the legislature to municipalities, boards, commissions, and subordinate state agencies. [Teeter v. City of Edmond](#), 2004 OK 5, 85 P.3d 817 (Okla. 2004).
- 3 [Dwyer v. City Council of Berkeley](#), 200 Cal. 505, 253 P. 932 (1927).
- 4 [Malone v. Williams](#), 118 Tenn. 390, 103 S.W. 798 (1907); [De Silvia v. State](#), 88 Tex. Crim. 634, 229 S.W. 542 (1921).
- 5 [Merrell v. City of St. Petersburg](#), 91 Fla. 858, 109 So. 315 (1926).
- 6 [City of South Euclid v. Glazer](#), 43 Ohio Misc. 9, 72 Ohio Op. 2d 213, 332 N.E.2d 780 (Mun. Ct. 1974) (a city ordinance which prohibited any party center from operating after 1:00 a.m. in the absence of a special permit granted by the mayor was unconstitutional on its face since it constituted an illegal delegation of legislative power to a city official in violation of the Constitution of Ohio and the 14th Amendment).
- 7 [Kwik Shop, Inc. v. City of Lincoln](#), 243 Neb. 178, 498 N.W.2d 102 (1993); [Ex parte Smalley](#), 156 S.W.3d 608 (Tex. App. Dallas 2004), petition for discretionary review granted, (June 22, 2005) and petition for discretionary review dismissed, 173 S.W.3d 71 (Tex. Crim. App. 2005).
- 8 [Ex parte Smalley](#), 156 S.W.3d 608 (Tex. App. Dallas 2004), petition for discretionary review granted, (June 22, 2005) and petition for discretionary review dismissed, 173 S.W.3d 71 (Tex. Crim. App. 2005).

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